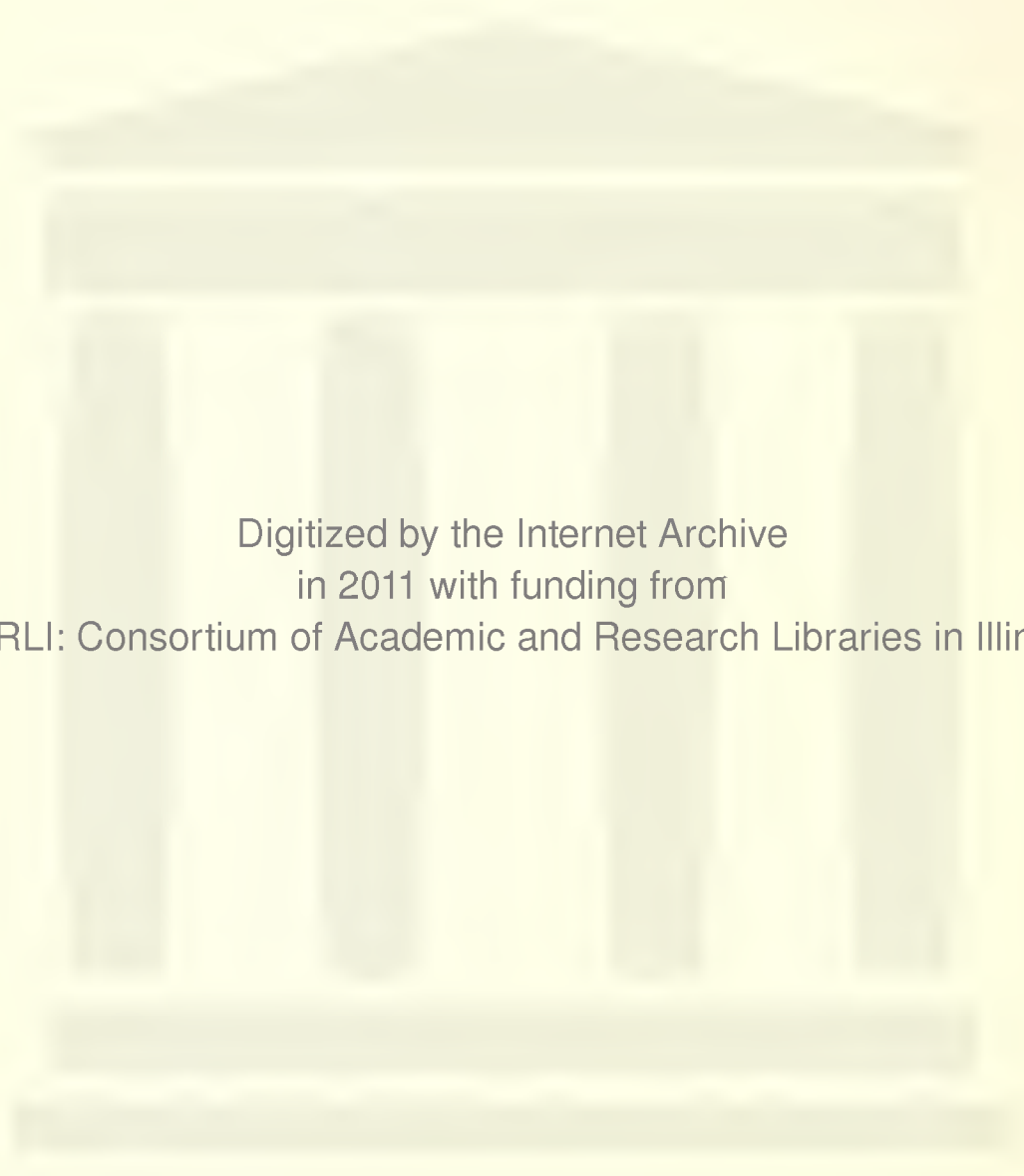






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47784

WALTER J. RUBENS, FLORENCE S.
RUBENS, ETHEL R. SILVER,
ROBERT L. RUBENS and LEE H.
RUBENS,

Appellants,

v.

HARRY S. RUBENS, RICHARD H.
RUBENS and RUBENS & MARBLE,
INC.,

Appellees.

)
)
)
)
) APPEAL FROM CIRCUIT
) COURT, COOK COUNTY.
)
)
)

261A.1²

MR. JUSTICE McCORMICK DELIVERED THE OPINION
OF THE COURT.

This appeal is taken from a summary judgment entered in the trial court in favor of Harry S. Rubens, Richard H. Rubens and Rubens & Marble, Inc. (hereafter referred to as the defendants), and against Walter J. Rubens, Florence S. Rubens, Ethel R. Silver, Robert L. Rubens and Lee H. Rubens (hereafter referred to as the plaintiffs).

The action was brought by the plaintiffs as shareholders of Rubens & Marble, Inc., an Illinois corporation, against the said corporation and two of its directors. The action was brought by the shareholders both in their individual capacities and derivatively on behalf of the corporation. As individuals, in the first count of the complaint the plaintiffs asked for dissolution of the defendant corporation because of oppressive conduct directed toward plaintiffs by defendant Harry S. Rubens, a director of the corporation, who the plaintiffs assert controlled the said corporation. In the second count of the complaint the plaintiffs derivatively asked that the two

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defendant directors pay damages to the corporation because of illegal bonuses and salaries received by the directors, mismanagement and waste committed by the said directors, and the usurpation by said directors of corporate opportunities.

The defendants filed a motion for summary judgment based on the discovery depositions of Walter J. Rubens and Robert L. Rubens. The plaintiffs filed a motion in opposition thereto based upon alleged insufficiencies in defendants' motion and supporting depositions, the allegedly uncontradicted allegations in plaintiffs' amended complaint, and portions of discovery depositions of defendants Harry S. Rubens and Richard H. Rubens. The court denied the motion of plaintiffs, granted the defendants' motion for summary judgment and entered a decree dismissing the cause. This appeal is taken from that decree, as well as from an order, entered subsequent to the decree, taxing certain costs against the plaintiffs.

The only question which we must decide is whether or not the trial court erred in sustaining the defendants' motion for summary judgment. The record in the case is voluminous and the plaintiffs raise a great number of points in their brief. Under the view we take of the case it is only necessary to consider one point.

In the first count of their amended complaint the plaintiffs allege that Harry S. Rubens caused the corporation to pay large and illegal salaries and bonuses to himself and to his son, Richard H. Rubens, and plaintiffs complain particularly

of the bonuses paid in the years 1947, 1948, 1950, 1951, 1952, 1953, 1954, 1955 and 1956. It is further alleged that bonuses were purportedly authorized at meetings of the board of directors held in December during the years 1952 through 1956, inclusive. It is further alleged that those meetings were in fact never held and the minutes reporting them are fictitious, and in the alternative the plaintiffs allege that if such meetings were held they were conducted without proper notice having been given to the members of the board of directors, that the by-laws of the corporation provide for an annual meeting of the board of directors on the first Tuesday of July for which no notice need be given, and all other board of directors' meetings are special meetings, and the by-laws provide that the president must give two days' notice to each director and that neither Walter nor Robert Rubens received any notice of the meetings allegedly held in December of the years 1947, 1948, and 1950 to 1956, both inclusive. It is further alleged that if such meetings were held, the bonuses involved were voted on without a quorum present at the meetings.

The intended purpose of the summary judgment statute (Ill. Rev. Stat. 1959, ch. 110, par. 57) is not to authorize the court to try issues of fact, but its purpose is to expedite trial procedure by permitting the court to determine whether there is any existing genuine issue of fact before the court. Allen v. Meyer, 14 Ill. 2d 284; Shirley v. Ellis Drier Co., 379 Ill. 105; Diversey Liquidating Corp. v. Neunkirchen, 370 Ill. 523; Gliwa v. Washington Polish Loan & Bldg. Ass'n,

310 Ill. App. 465.

The discovery depositions of Walter J. Rubens and Robert L. Rubens, taken by the defendants, were offered by the defendants in support of their motion for summary judgment. The discovery depositions of Harry S. Rubens and Richard H. Rubens, taken by the plaintiffs, were offered by them in support of their motion in opposition to the motion for summary judgment. These depositions can only be used in a summary judgment proceeding as admissions against the deponent. They are governed by Supreme Court Rule 19—10.

Plaintiffs allege that certain specified meetings at which bonuses were allegedly granted were either not held or else were called without notice to the directors and that a quorum was not present at the meetings. In Robert Ruben's deposition he testified that he was present at all of the annual meetings held in July from 1943 to 1957 but that he does not recall ever having attended any meeting at which bonuses were voted to the officers. Bonuses allegedly were voted at December meetings. Minutes of the directors' meetings held in December from 1938 to 1945, inclusive, are in the record; there are no minutes in the record for the years 1947, 1948, and 1950 to 1958, inclusive.

Walter Rubens testified in his deposition that he had never attended a meeting in December since 1930 or before, and none in which a bonus resolution was voted on and adopted by the board. There are exhibits in the record which purport to represent directors' meetings held in December in the

years 1941 to 1945, inclusive, in which resolutions voting bonuses to plaintiffs and defendants were allegedly adopted and in which Walter J. Ruben's signature appears on the minutes as chairman of the board. None of those meetings were the ones listed in the complaint, and in this proceeding they are not determinative of the issues involved.

Plaintiffs allege in their complaint that the meetings at which the bonuses were purported to have been voted in December in 1947, 1948 and 1950 to 1956, both inclusive, were never held. That question of fact was left unresolved.

Plaintiffs' alternative contention, that if such meetings were held the bonuses were voted on without a quorum present at the meetings, is also left unresolved since there is nothing in the record showing the number of directors attending the meetings.

The further alternative contention made by the plaintiffs in their brief, that the by-laws of the corporation requiring notice for special meetings were not complied with, is supported by the statement made by Harry Rubens in his discovery deposition that no notice of prospective directors' meetings had been sent.

Defendants also argue that the burden is upon the plaintiffs not only to prove that the bonuses were improperly voted on but that the bonuses and salaries were in fact unreasonable. Unless the bonuses were voted at a meeting of the directors with a quorum present, they were void. The directors and officers might be entitled to such portion of the bonuses as would be compensation for reasonable additional services performed by them. The burden rests upon them to make such proof. Voorhees

v. Mason, 245 Ill. 256; Bloom v. Vehon Co., 341 Ill. 200.

The defendants also argue that the bonuses were approved in each case at the annual meeting of the stockholders and that hence the plaintiffs could make no complaint. The only minutes of a stockholders' meeting in the record are those of one held in July 1943. No stockholders' meeting is shown approving the bonuses in issue.

Defendants argue that the plaintiffs are guilty of laches. In order that the summary judgment in the case before us might be justified on that ground it is necessary that all of the plaintiffs should be guilty of laches. There is no showing in the record that Florence S. Rubens (Walter Ruben's wife), Ethel R. Silver (Walter Ruben's daughter), or Lee H. Rubens (Walter Ruben's son) had any actual or imputed knowledge of the payments. Defendants state it is the law that a wife or child is charged with knowledge acquired by their respective husband or parent, and in support of that contention cite Bilhuber v. Bilhuber-Wawak Co., 245 Ill. App. 552; Grossberg v. Haffenberg, 367 Ill. 284; 41 C.J.S. Husband and Wife, sec. 74; and 67 C.J.S. Parent and Child, secs. 62-64. In the Bilhuber case and the Grossberg case the court held that the husband was the agent of the wife. Section 74 of 41 C.J.S. Husband and Wife holds that "a married woman is ordinarily charged with knowledge acquired, or notice received, by her husband while acting within the scope of his authority as her agent," and in 67 C.J.S. Parent and Child, sec. 64 it is stated that "a parent may act as agent for his child when duly

authorized, but an inference of the existence of such agency does not arise merely from the existence of the parental relation." There is nothing in the record that Walter Rubens was acting as agent for Florence, Ethel or Lee. Nor if laches can be imputed to Walter or Robert Rubens, Florence, Ethel and Lee could not be held to be guilty of laches because there is no showing in the record that they had any knowledge whatsoever of the bonus grants.

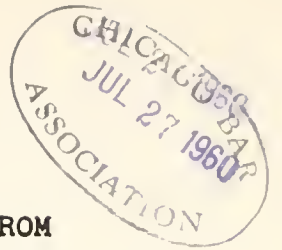
There is a genuine issue of fact involved with reference to the validity and reasonableness of the bonuses purportedly voted by the directors of the corporation. Since under those circumstances a summary judgment could not have been entered, it is not necessary to discuss the other points raised in the briefs. It follows that the order taxing costs against plaintiffs should not have been entered.

The decree of January 21, 1959 entering summary judgment and dismissing the cause and the order of January 30, 1959 taxing costs against plaintiffs are reversed and the cause remanded for further proceedings consistent with this opinion.

Reversed and remanded.

Dempsey, P. J., and Schwartz, J., concur.

ABST.



47917

CHICAGO CUT STONE CO., a corporation,

Appellee,

v.

JOSEPH NICOSIA, et al, etc.,

On Appeal of JOSEPH NICOSIA,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

26 I.A. 231²²

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant Nicosia from an order denying his petition under section 72 of the Civil Practice Act, Ill. Rev. Stat., ch. 110, sec. 72 (1959), to vacate a judgment after 30 days.

Plaintiff, a subcontractor, furnished material for construction of an improvement in Nicosia's property. A dispute arose about the materials and Nicosia did not pay plaintiff's bills. Plaintiff filed a mechanic's lien foreclosure suit which eventuated on July 29, 1958, in a default judgment against Nicosia for \$1331.00. Within 30 days Nicosia filed a motion to vacate, and thereafter, on August 13, 1958, plaintiff had judgment in garnishment against the Oak Park National Bank for \$450.00 in partial satisfaction of the judgment. On October 15, 1958, Nicosia's petition to vacate was denied. On January 20, 1959, the garnishment judgment was confirmed. On March 4, 1959, the instant petition of defendant Nicosia was filed and on June 2, 1959, was denied.

Nicosia contends the trial court had no jurisdiction to enter the judgment because Einar Jansen, the contractor, was not before the court. If the trial court had no jurisdiction we shall reverse the judgment on plaintiff's petition for error apparent on the record. *Collins v. Collins*, 14 Ill. 2d 178, 183.

The complaint alleges that plaintiff "offered to furnish cut stone ... to the defendant Einar Jansen, contractor for defendant ... Nicosia." The Mechanic's Lien Notice to Nicosia stated "that Chicago Cut Stone Co. was employed by Einar Jansen to furnish cut stone ... under his contract with you...." There is no basis under these circumstances for the contention that Jansen was merely Nicosia's agent. *Kilburg v. Petrolagar Laboratories, Inc.*, 280 Ill. App. 527, 530.

The purpose of the Mechanics' Liens Act is to protect those who in good faith furnish material or labor for the construction of buildings or public improvements. *Love, Mechanics' Liens* 1 (2d ed. 1950). As plaintiff's suit and notice of lien indicate, plaintiff's contract was with Jansen. Plaintiff therefore had no right to recover against Nicosia alone on that contract. *Kilburg v. Petrolagar Laboratories, Inc.*, 280 Ill. App. 527; *Love, Mechanics' Liens*, 385-404 (2d ed. 1950). The Mechanics' Liens Act in section 28 requires that if the subcontractor sues for a personal judgment, such a suit "shall be against both contractor and owner jointly" and no "judgment shall be rendered ... until both are ... brought before the

court. And "all such judgments shall be against ... both jointly...." Ill. Rev. Stat., ch. 82, sec. 28 (1959). These are jurisdictional requirements. Levin v. Sylvan Metal Products Co., 252 Ill. App. 140. The Mechanics' Liens Act, in derogation of the common law, is to be strictly construed as to its requirements. Armstrong v. Obucino, 300 Ill. 140. The court exceeded its jurisdiction in entering the judgment against Nicosia alone, Jansen not having been brought into court.

We need consider no other point raised.

The judgment is void, the order denying Nicosia's motion to vacate is reversed, the judgment is vacated, and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

MURPHY, P.J. AND BURMAN, J. CONCUR.

ABSTRACT ONLY.

ADST.
47965

CHESTER SUM WONG,

Plaintiff - Appellant,

v.

GEORGE HAZARD and CHARLES HAZARD
d/b/a GEORGE HAZARD AND SON,

Defendants - Appellees.

CHICAGO BAR
JUL 2 1966
ASSOCIATION
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

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MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action, filed December 27, 1955, to recover damages for breach of warranty and of a guaranty in the purchase and installation of two Iron Fireman Selectemp heating units. The court without a jury entered judgment for plaintiff for \$800.00 and plaintiff has appealed.

The sale of the heating units was made August 1, 1958. One unit was for three adjoining stores at 2252-54-56 Wentworth Avenue, the other for a store and two flats above at 2314 Wentworth Avenue, in Chicago. Defendants guaranteed plaintiff in writing that they would "without reservation" replace "without any cost or charges ... any defective materials and labor ... for a period of one year" on the installation at the store and flats above. On December 15, 1955, and January 10, 1956, plaintiff signed completion certificates for the F.H.A. which had loaned plaintiff money for the purchase. As to these certificates plaintiff said he did not read English very well. He executed the certificates at defendant's request so defendant could get the sales price.

The decisive question is whether the court erred in limiting plaintiff's damages to \$800.00.

Plaintiff told defendants before the purchase that he must have 70 degree heat in the stores and flats in order to comply with city ordinances. After the boilers were installed, they did not perform their functions, for if the thermometer were set for even 90 degree heat, the temperature would not go above 60 degrees.

In installing the boilers, defendants, Iron Fireman dealers, said they followed the Iron Fireman manual of instruction. They installed 3/8 inch heating pipes. But the manual used was for 1953 installations and the 1955 manual - in effect when the installations here were made - called for 1 1/2 inch pipes. The 1955 manual did not recommend the kind of insulation used by defendants and the pipes were "poorly insulated" and installed. A "trap" they used was "against all recommendations of good piping." The pipes were "15 times too small" in heat-carrying capacity to meet plaintiff's requirements.

The installation was supervised by an Iron Fireman sales manager with two weeks instruction in the principles of installation. He testified as an "expert" for defendants. He admitted using an outdated manual; that the "risers" in piping should have been insulated and were not; and that he was not competent to follow the guide of the American Society of Heating Engineers.

Plaintiff's expert who gave the critical testimony about the insulation, pipes and traps, testified that the boiler for the store and flats at 2314 Wentworth Avenue was large enough, but the pipes were too small and improperly installed. He also testified that both the boiler and pipes at the Wentworth stores were too small.

Plaintiff's counsel at the trial did say, "We are not complaining about the units, the units are O'kay. It is how - what methods were used in insulating the units that makes the units inoperative." But plaintiff, on the stand at the time, repeatedly offset this admission by saying "No". And in the post-testimony colloquy, between court and counsel, defendants' attorney cast some doubt upon whether minds had met on just what was admitted by attorney for plaintiff.

This colloquy, in our opinion, was an inadequate basis for the judgment rendered. There was evidence for the plaintiff of the contract price of \$2150.00 for the boiler installed for the Wentworth Stores and testimony that he relied on defendants' knowledge of heating and did not get what he had bargained for, i.e., installation of a boiler which would meet the legal heating requirements of 70 degrees. This was uncontradicted, and liability for breach of implied warranty was thereby established. Ill. Rev. Stat., ch. 121 1/2, sec. 15 (1959).

A statement was made in the colloquy that when the installation was made at the Wentworth Stores, plaintiff was told of the "necessity of putting in a certain amount of radiation

there and a certain size boiler," and that he said he could not pay the \$3765.00 to meet the necessity because it was not needed. This has no bearing on defendants' failure to provide a boiler that would comply with the 70 degree heat requirement or on the failure to install the adequate piping. There was no justification for the installation of equipment having less than the capacity needed for meeting the legal standards.

The trial court during the colloquy attempted to adjust the suit according to a rough fairness on the basis of defendants' offer of \$800.00. In view of the evidence in the record for plaintiff, we think this figure was unfair, but we can not determine a just figure since defendants' case was never presented and his experts never testified. We see no alternative in the interest of plaintiff's rights and orderly procedures but to reverse the judgment and order a new trial with respect to the issue of damages only. Liability has been proven.

In the aid of a new trial we point out that we consider this a special purpose warranty sale where the measure of damages is "the loss directly and naturally resulting" from the breach, as set forth in section 69(6) of the Sales Act, Ill. Rev. Stat., ch. 121 1/2, sec. 69(6) (1959), and Phelan v. Andrews, 52 Ill. 486, 490-91.

The judgment is reversed and the cause remanded for a new trial as to damages.

REVERSED AND REMANDED.

MURPHY, P.J. AND BURMAN, J. CONCUR.

ABSTRACT ONLY.

IN THE APPELLATE COURT OF ILLINOIS
SECOND DISTRICT, FIRST DIVISION
OCTOBER TERM, A. D. 1959

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

LEFFEL KING,

Plaintiff in Error.

Error to

the County Court,

Winnebago County.

26 I.A.^{2d} 28

McNeal, P. J. -

Leffel King was found guilty by the county court of Winnebago County of the offense of operating a motor vehicle after revocation of license and was sentenced to be confined in the county jail for a period of seven days. On this writ of error to review that judgment defendant contends that his conviction should be reversed (1) because the information against him was made and the prosecution thereof was conducted by an assistant State's Attorney acting in his own name, (2) because the court erred in the admission of evidence and in permitting amendment of the information after trial, and (3) because the evidence is insufficient to sustain the conviction.

The original information charged that on December 27, 1957, defendant "being then and there a person whose operator's license to operate a motor vehicle has heretofore been revoked or suspended as provided in 'An Act relating to the regulation of the privilege of operating motor vehicles upon highways', approved June 25, 1953; as amended, did unlawfully and wilfully operate a motor vehicle upon a public highway while such license was revoked or suspended, contrary to the form of the statute", etc. This information was brought in the name of, signed, and sworn to as true by an assistant State's attorney in and for the County of Winnebago. The court denied defendant's

motion to quash the information, and a plea of not guilty was entered to that charge. Thereafter a trial by jury was waived and the trial proceeded before the court.

The evidence for the prosecution consisted of the testimony of two Rockford police officers and a certificate issued by the Secretary of State. The officers testified that they stopped a vehicle driven by defendant on December 28, 1957. Over defendant's objections the officers were permitted to testify that defendant then stated that his driver's license had been revoked. The court also denied defendant's motion to strike the officers' testimony relating to any confession or admission at the time of defendant's arrest. The court then admitted in evidence over defendant's objection an instrument properly certified by the Secretary of State of Illinois which contained a photostat of a report of conviction of the defendant on May 19, 1955, of reckless driving, by the county court of McHenry County. The instrument recited that there was no record of an Illinois license, and notified defendant that on May 24, 1955, an order of revocation had been entered "In the Matter of the Revocation of the Privilege to Obtain an Illinois License", wherein defendant's privilege to drive in the State of Illinois had been revoked. One of the objections to the admission of this instrument in evidence was that there had been no showing that defendant had a license or permit issued by the State of Illinois at the time the order of revocation was entered. At the conclusion of the People's evidence, defendant moved the court to find him not guilty because the State had failed to prove the material elements of the offense charged, i.e. that King ever had a driver's license which could have been revoked. The motion was denied, defendant rested, and the court took the case under advisement for an indefinite period.

Several days later the court granted leave to amend the information "to conform to evidence." Pursuant to this leave the entire information except the formal or printed parts thereof was replaced. In substance and effect the portions of the information

identifying defendant as a person whose license to operate a vehicle had been revoked and charging his operation of a vehicle while his license was revoked were stricken and replaced respectively by statements referring to defendant as a person "whose privileges to operate a motor vehicle have heretofore been revoked", and to his operation of such a vehicle "while such privileges were in a status of revocation." The information as replaced was submitted by another assistant State's Attorney, but it was not sworn to and no plea was entered to the replacement. Defendant's motion to quash the information as amended was denied. The court found defendant guilty of driving after revocation of license as charged in the information, denied his motions for a new trial and in arrest of judgment, and promptly imposed sentence.

In *People v. Moore*, 21 Ill. App. 2d 9, 157 N.E. 2d 94, we considered errors of the same nature as those assigned in the instant case. In the *Moore* case we concluded that the offense of operating a motor vehicle on a highway after the operator's license has been revoked is not the same offense as that of operating a vehicle while the operator's privilege to obtain a license and his privilege to operate a vehicle have been revoked, that verification of an original information could not be applied to an information as amended, and that defendant was not required to plead to a charge in an amended information unless verified. We also held that the absence of an affirmative showing of a plea of not guilty to the amended information was fatal to the record in that case.

After our opinion was filed in the *Moore* case, the Supreme Court reconsidered the then crystallized rule that a criminal conviction was a nullity unless the record showed that the defendant had entered a plea, and held that the want of a formal plea of not guilty does not require that a judgment of conviction be set aside where the record shows without doubt that the case was tried on the assumption that a plea of not guilty has been filed. *People v. Hill*, 17 Ill. 2d 112, 160 N.E. 2d 779. In that case the Court said that the record should

be examined to determine whether or not the omission of a formal plea adversely affected the rights of the defendant and concluded that under the circumstances present there the case was tried upon the assumption that a plea of not guilty had been filed.

Leffel King was tried and all evidence adduced against him on the issue made by his plea of not guilty to the original charge that he operated a motor vehicle while his license to do so was revoked. The only reference to a revoked license in the evidence was the testimony of the police officers that when they arrested King he stated that his license had been revoked. This statement was in the nature of an oral confession, and was not admissible where the confession and names and addresses of the persons present at the time it was made, were not furnished the defendant or his counsel prior to arraignment. Par. 729, Ch. 38, Ill. Rev. Stat. 1957. The certificate of the Secretary of State clearly showed that no Illinois operator's license was involved and that the Secretary of State had revoked King's privileges to obtain a license or to drive in Illinois, but not his license. Apparently the prosecutor recognized that the admissible evidence adduced on the trial failed to sustain the charge contained in the original information and obtained leave to replace that charge.

After the original charge was stricken and replaced by an unverified statement of a separate and distinct offense, i.e. that King operated a vehicle while his privileges to do so were in a status of revocation, he was not called upon to plead to the offense so stated. No plea was entered by defendant, and as we held in the Moore case, none could have been required of him because the statement was not verified. No further evidence was adduced by the prosecution or the defense, and there was no trial of any issue formed on this unverified statement. After the original charge had been replaced by this statement, defendant's participation in the proceedings consisted of his motions to quash, for a new trial, and in arrest of judgment. None of

these actions indicated that defendant had entered a plea of not guilty to the replaced charge, and he did nothing upon which a presumption that he had entered a plea might be predicated. We cannot say that the record in this case shows without doubt that the stated offense which the evidence tended to prove and of which King might have been convicted was tried upon the assumption that he had entered a plea of not guilty. This case is distinguishable from *People v. Hill*, supra.

We conclude that King was prejudiced by the erroneous admission in evidence of his statements that his license had been revoked when no information of such confession was furnished to him or his counsel prior to arraignment as required by statute; that his right to a trial according to law was adversely affected by the attempt to amend the information after trial without further verification and entry of a plea; and that the admissible evidence in the record in this case does not sustain a conviction on the offense charged in the information. For these reasons the judgment and sentence of the county court of Winnebago County must be reversed. It is unnecessary to consider whether or not an assistant State's Attorney has any power or authority in his own name to commence and prosecute an action by information or to amend it after trial.

Reversed.

DOVE and SPIVEY, J.J., concur.

In The

APPELLATE COURT OF ILLINOIS

Fourth District

Barker-Lubin Co., a corporation,)
)
 Plaintiff-Appellee,)
)
 vs.)
)
 L. J. Wanous, et al,)
)
 Defendants-Appellants.)
)
 Community Unit School District No. 1,)
 Madison County, Illinois, for the use)
 of Barker-Lubin Co., a corporation,)
)
 Plaintiff-Appellee,)
)
 vs.)
)
 L. J. Wanous, et al., and Massachusetts)
 Bonding and Insurance Company, a)
 corporation,)
)
 Defendants-Appellants.)
)
 (Consolidate))

FILED
 MAY 23 1960
James R. McLaughlin
 CLERK OF THE APPELLATE COURT
 FOURTH DISTRICT OF ILLINOIS

Appeal from the
 Circuit Court of
 Madison County,
 Illinois

26 MA-181

 Honorable Harold R. Clark, Judge Presiding.

Scheineman, P. J.

This litigation consists of suits filed by plaintiff, hereafter referred to as Barker, against defendants named Wanous (first a partnership and later a corporation) for a claimed balance due for plumbing and heating supplies sold and delivered. Barker is a wholesaler of such supplies, and Wanous was a subcontractor who had five contracts with a school district for the installation of plumbing and heating in several buildings.

The school district is involved by reason of plaintiff asserting a statutory lien against any funds remaining in its hands due to Wanous on the five contracts. Plaintiff also sued the bonding company which was the surety on the bonds given the school district by Wanous. This was brought in the name of the school district for the use of Barker, and Wanous was also sued. The suits were consolidated and referred to a master, who reported the evidence and his findings and conclusions to the court. The exceptions were overruled and the report approved, with a decree for plaintiff, from which this appeal was taken.

The evidence, including a large quantity of figures used in various computations, is too voluminous to set forth with any great detail, but some of the essentials are here set forth and other items will be included in our discussion of the facts.

The school district advertised for bids on three new buildings. A salesman for Barker, called on Wanous knowing he was interested in this work. The salesman procured from Wanous a set of plans which he took to his company for the purpose of making a "take off" of plumbing and heating materials, there being three of each. He took the plans to Barker who hired a plumber to make a list of needed materials, then Barker's manager, named Engel, priced the material, and took itemized typewritten lists to Wanous on February 23, 1952, also returning the plans. While on this trip, Engel called some supply houses in St. Louis for certain prices, then completed his lists and totaled them. He wrote out in ink three slips of paper stating the names of the three school jobs and the total of the lists for the plumbing and the heating contracts on each. These slips were attached to the itemized lists and left with Wanous.

The next day Engel wrote a typewritten letter to Wanous

saying: "We are pleased to quote you on the Plumbing and Heating material for the following jobs:" There followed the names of three buildings and the same totals that were on the pen and ink slips left with Wanous.

Thereafter Wanous put in his bids for the three plumbing jobs and for two heating jobs, and obtained the contracts. Wanous did not bid on the other heating contract because he was afraid of the material cost being too low. Barker and Wanous then executed written documents for each of the five jobs before any material was delivered, in the form of a proposal by Barker, as follows: "We propose to furnish the materials under the heating scope as shown in the attached lists subject to mutual revision for the sum total of \$12,992.75."

A similar sentence appeared in each contract, followed by mutual agreements as to delivery, payment, discount, freight allowances, etc.

The main bone of contention between the parties is: what was the contract between Barker and Wanous? Wanous contends it was for a flat price on each job regardless of the materials actually used, while Barker contends it was for items "as shown in the attached lists subject to mutual revision."

The master found the written contract settled the rights of the parties, that the agreed price was for the itemized list of materials attached to each contract, and the chancellor approved the report and entered decree accordingly. The first question before this court is whether the evidence supports that result.

To support the assertion that the parties contemplated a flat price for the total of all material required in any of the contracts,

there is very little evidence. The conversation between Barker's salesman and Wanous contains some references which may be construed to mean that was possible, but there is no claim that the salesman had any authority to make a contract, or made any pretense of doing so.

It is undisputed that Engel, Barker's manager, conducted all further negotiations up to and including the written agreement, and continued to manage the execution of the contract. Engel testified that he instructed the salesman to inform Wanous they were to compare the submitted lists of materials and prices with Wanous' own lists. Engel, himself, took the lists to Wanous and made the same statement. Engel testified that he never told Wanous that, if the lists did not contain all the required material, nevertheless it would have to be furnished. This statement is uncontradicted. Neither of the Wanous brothers testified to anything said by Engel when the lists were submitted.

Engel further testified that the lists could not be exact, because the plans submitted included only the maps, without the elevations, therefore the height of vent stacks could not be fixed. He stated that the vent stacks are often made with soil pipe, and that the local code requirements as to joints varied, so that it could not be known at his office whether full leaded joints would be required. It may be noted here that, among the items later said to be under-stated in quantity, were soil pipes and lead.

Wanous testified that, before the final contract was signed, he had asked Engel to omit itemized price lists, and Engel refused, stating Barker required this. The reason Wanous gave for objecting to attaching the lists was: they might contain more or less than the actual amount

used. The word 'more' is here emphasized because the only reason to fear such a result would be that Barker might claim the right to deliver and charge for the entire list, even if not needed. It cannot be reconciled with a claim that the totals of the lists were flat contract prices, for in that event, Wanous would be obligated to pay the stated price regardless of quantity used. Barker could not demand a greater price if a larger quantity were needed, and Wanous could not claim a reduction if the lesser quantity was used. Pursuant to that objection, the final contract had the inserted words after reference to attached lists "subject to mutual revision." That was the document executed for each job.

It was Wanous' decision not to make any further check on 5 of the contracts, but to act on the submitted lists, and not to bid on the other contract because he feared the materials were too low. This is from Wanous' own testimony.

From the foregoing, we are unable to find any substantial basis for the assertions of the defense. The written contract is not ambiguous, it proposes to furnish the listed material at the stated price, and nothing more. In addition, we have scanned the testimony of both the Wanous brothers as to oral statements made concerning a flat contract price prior to signing the contract. There is not one statement attributed to Engel, or any other person purporting to act with authority for Barker, to the effect that what appear to be mere totals of the itemized lists were actually to be flat contract prices for all material ultimately needed on the 5 jobs, regardless of kind, quality or quantity.

Likewise, there is no testimony by Wanous as to any statement made by either brother to Engel indicating a belief that they had

a proposal for a flat contract price.

That there was no such belief is indicated by Wanous' stated reason for not submitting a bid on the heating contract of one school, - - because of fear the materials list was too low. This fear would be justified only if the list was a scale of unit prices to be applied to the total quantity finally delivered. If the total of that list was to be a flat price, regardless of total deliveries, then Wanous could not be liable for more to Barker no matter how low the list might be.

The master ruled that the preliminary negotiations were merged in the signed contract and were not relevant to it. This court finds no fault with that ruling, but has set forth the testimony for two reasons: (1) the contention of the defense that such negotiations sometimes are considered in special cases; thus, they are stated here to show there is no substantial reason to consider that testimony as bearing on the contract. And, (2) because of the reference to the doctrine of promissory estoppel, hereafter mentioned.

We next refer to testimony as to conversations subsequent to the execution of the written documents. The purpose of this testimony is not clear. It certainly has nothing to do with new contracts, so we assume it is supposed to show the construction placed on the contract by the parties, and have examined it for that purpose.

There is some conflict between Engel and Wanous as to these conversations, but we do not regard it as material. Most of the statements attributed to Engel were mere generalities, to the effect that Wanous had a contract, Wanous need not worry, Barker would abide by the contract even if it lost money, etc. These generalities would apply to any contract, and give no indication of what it was.

The only specific statement of interpretation occurred when Wanous found that the invoices he was paying to Earker for deliveries were rapidly approaching the totals he expected to pay. When he called Engel about it, the latter apparently assumed the complaint was about excessive deliveries, and he again assured Wanous there was nothing to worry about. Wanous then quotes Engel: "When the job is through, if there is anything left over, whatever is left you return that to us and I will give a blanket credit between your contract and what the invoices call for."

If there had existed a flat price for the total of materials, regardless of quantity, then Wanous would not have to pay any more than the flat price, but neither would he be entitled to pay any less.

Thus, we find the evidence amply supports the finding against the claim that the parties had a contract for a flat price, rather than unit prices on estimated quantities. This is not a complete statement of the evidence, but is sufficient to show that the decree is not contrary to the manifest weight of the evidence.

There remains nothing for the defense to point to, except the letter quoting prices on material for six jobs. Obviously, this offer could not become a contract of purchase and sale unless accepted. Wanous assumed no obligation at that time and never did accept one proposal for heating material. The acceptance of the other five was made by specific agreement, signed by both parties, and in plain words made the prices pertain to the lists attached.

The preliminary negotiations would, in any event, become merged in the final contract. *Chicago and Riverdale Lumber Co. vs. Tatum*, 203 Ill. App. 421; *Armstrong Paint and Varnish Works vs. Continental Can Co.*, 301 Ill. 102; *Sadler v. National Bank of Bloomington*, 403 Ill. 218, 228.

Some reference has been made to the doctrine of Promissory Estoppel, although the defense denies it is necessary to resort to that doctrine. It is a doctrine long used to support promises to charities, but the Restatement of Contracts (Sec. 90) purports to extend it in limited form to commercial transactions.

It is a theory of law by which a person may be held liable upon a promise, for which there is no consideration. The theory was that, if the promise is made with the intent that it be relied upon, and the promisee does rely upon it and puts himself in a position where grave injustice would result if the promise is not kept, it may be enforced. This has nothing to do with contract law where there is a consideration, such as mutual promises.

The name, "Promissory Estoppel," is modern, but the doctrine had existed in some jurisdictions for many years. It has not received much attention in Illinois, and we do not go into it further in this case, because the doctrine has never been considered available when the parties have entered into a contract which is binding under contract law. *Union Mutual Life Ins. Co. v. Mowery*, 96 U.S. 544, 24 L. Ed. 674.

In this case, the plaintiff's manager warned Wanous to check the lists, and this testimony is uncontradicted. From this, and from other evidence previously reviewed, this court finds as a matter of fact there was no such unqualified promise, so that the doctrine of Promissory Estoppel has no application.

Moreover, the court holds as a matter of law that, when the parties enter into a completed contract of offer and acceptance, a court has no principle of law by which it can disregard the plain provisions of that contract. *Chicago and Riverdale Lumber Co. vs.*

Tatum, 203 Ill. App. 421; Telluride Powder Co. v. Crane Co., 208 Ill. 218; Decatur Lumber Co. vs. Crail, 350 Ill. 319, 323; Olson v. Rossetter, 399 Ill. 232, 238; Swating vs. Campbell, 8 Ill. 2d 54.

Another point raised by Wanous, is that the court has included in plaintiff's lien the price of two blower units in the sum of \$7656, in spite of the fact that Engel promised to pay that item, and confirmed the promise by letter.

The circumstances were these: Wanous notified Engel that the engineer was insisting upon blowers made by a company which did not sell to dealers, but only to contractors. Under the impression that this equipment was to be supplied by Barker, Wanous proposed to acquire the blowers and pay for them, but he insisted that he should be reimbursed and demanded that Engel write him to that effect. Engel did so, believing this was part of the listed material.

This was a mutual mistake of fact. The chancellor has approved the master's finding that there was no consideration for the promise and it is not binding upon Barker. There was also a finding that these blowers were "extras" and counsel have not, in briefs or abstract, referred to anything in the record to the contrary. There was no error in this ruling. *Goldsborough vs. Gable*, 140 Ill. 269, 273.

The defendant bonding company asserts that the judgment against it is erroneous, because its principal was a party to the suit and the judgment should have been against the principal as well as the surety, citing several cases, most of them dealing with official bonds. The citations are not in point. The law of this state makes it a part of every bond of this type, that the sureties, as well as the principal, "agree to pay all persons * * * for materials furnished * * * when such claims are not satisfied out of the contract price * * *." Ill. Rev. St.

Ch. 29, Sec. 15. This imposes a direct liability upon the surety.

The bonding company was sued under Section 16 of the same act, which provides: "Every person furnishing material * * * shall have the right to sue on such bond in the name of * * * the political subdivision entering into such contract * * *." We deem it clear that suit may be pressed against the surety, without asserting anything against the principal, whether he is a party or not.

Of course, the bonding company has a right of indemnity against its principal, which it could have asserted in this suit by third party complaint, or in a separate action in which it may assert indemnity for this and other claims it may have paid.

The defendant school district complains that the decree provides for a judgment against it. It does not dispute the amount of the balance in its hands remaining due to Wanous. By Section 23 of Ch. 82, Ill. Rev. St., the plaintiff has a lien on those funds. That section provides the school district may pay the money to the clerk of the court, to abide the result of the suit. The statute is silent as to what the court should do if the district has not followed this provision.

The school district was represented in the litigation as an active party, and appears as an appellant here. The decree provided: " * * * Barker-Lubin Co., shall have a lien for said \$25,205.64 upon said funds in the hands of * * * School District Number 1 * * * and that plaintiff Barker-Lubin Co., have and recover from the defendant * * * School District * * * the said sum of \$25,205.64." The declaration of lien was clearly correct, and if the rest of the paragraph is error, it is harmless error since it is the duty of the school district to pay the money.

1. *Phragmites australis* (Cav.) Trin. ex Steud.

[illegible][illegible]

1992

[illegible]

1990

1911

$$f_1 = \frac{1}{2} \left(\frac{1}{2} + \frac{1}{2} \right) = \frac{1}{2} \quad \text{and} \quad f_2 = \frac{1}{2} \left(\frac{1}{2} + \frac{1}{2} \right) = \frac{1}{2}$$

1. *Phragmites* (common)

•

Moreover, the school district was appearing as an adversary and if it continued that attitude, it might become necessary for plaintiff to file another action against it. Under these conditions we are of the opinion the chancellor was justified in making the decree complete, so that it could be enforced by mandamus, if necessary.

Finally, it is asserted that the court erred in allowing interest on plaintiff's claims. The statute allows interest on monies due under an instrument in writing. Ill. Rev. St. Ch. 74, Sec. 2. This applies to building contracts, and interest starts at 5% from the time payment is due by the terms of the contract. *Keeler v. Herr*, 157 Ill. 57; *Heiman v. Schroeder*, 74 Ill. 158. The actual allowance of 5% in this case was computed from the date suit was filed, which is no ground for any defendant to complain.

Finding no error in the decree in this case, it is affirmed.

Decree Affirmed.

Culbertson and Hoffman, JJ., concur.

Publish abstract only.

STATE OF ILLINOIS

APPELLATE COURT—THIRD DISTRICT

AT AN APPELLATE COURT, Begun and held for the Third District of the State of Illinois, at
Springfield, on the FIRST TUESDAY in MAY A. D. 19⁶⁰

PRESENT

HONORABLE C. ROSS REYNOLDS, Presiding Justice

HONORABLE WILLIAM M. CARROLL, Justice

HONORABLE BURTON A. ROETH, Justice

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that afterward, to-wit: On the 18th day of

MAY, A. D. 19⁶⁰, there was filed in the office of the said Clerk of said Court,

an opinion of said Court, in words and figures following:



Carroll, Justice

Plaintiff brought this action against defendants, Illinois Power Company, a corporation (hereinafter referred to as The Power Company) and Illiana Construction Company, a corporation, to recover damages for burns received in a sewer explosion while he was engaged in sewer construction work in Champaign, Illinois.

The material allegations of the amended complaint are that at the time of the explosion, plaintiff was inspecting a sanitary sewer and manhole in the vicinity of North Neil Street in the City of Champaign; that defendant Power Company then owned, maintained and operated a gas main which contained natural gas and which intersected or crossed over the sanitary sewer at the intersection of Hickory and Howard Streets; that defendant Illiana Company on and prior to the date of the said explosion had entered upon construction of a sanitary sewer which intersected or crossed under the said gas main and extended westerly from said intersection to a manhole on North Neil Street; that defendants knew that said natural gas was a highly dangerous instrumentality; that the gas supplied by the Power Company was not odorized; that during the construction of the sewer numerous leaks occurred in the Power Company mains where same were crossed by the Construction Company; that defendants were guilty of certain specific acts of negligence in constructing, installing and maintaining the sewer; in failing to odorize the gas in its mains, using improper materials for backfilling the sewer trench and in failing to inspect and test the sewer and gas mains;

that as a proximate result of said negligent acts of the defendants, gas escaped from the main and entered the sewer where plaintiff was working and exploded while he was in the manhole and that thereby plaintiff suffered burns over his entire body.

After the Power Company's motion to dismiss the amended complaint was overruled, it filed a counterclaim against the defendant, Illiana Company, in which it alleged the duty on the part of Illiana Company to use due care and caution in constructing sewers over the Power Company's gas mains and to avoid causing damage to said mains and charged Illiana Company with certain specific acts of negligence which resulted in damage to Power Company's gas mains. The counterclaim further alleged that when one of the Power Company's mains was damaged by such negligent acts, Illiana reimbursed the Power Company for the cost of making repairs to the damaged mains; that as a direct and proximate result of Illiana's negligence, the Power Company has been placed in such a position that it may be found guilty for the injuries complained of in plaintiff's complaint. The counterclaim also included a claim for moneys paid out by the Power Company in repairing damage to its mains caused by the alleged negligence of Illiana. A motion to strike and dismiss the counterclaim was denied. The Power Company was then given leave to file a third party complaint against R. D. Wilson and E. M. Anderson who will be referred to herein as Wilson and Anderson. It is alleged in the said third party complaint that Wilson and Anderson were consulting engineers employed to design improvements and give supervision to the construction of the sewer in question; that plaintiff

Dolezal was employed by Wilson and Anderson to supervise and inspect the work on said sewer; that third party defendants were under a duty to use due care in supervising the construction of the sewer and in instructing Dolezal in proper safety measures in the performance of his duties; and to provide him with proper equipment to carry out his duties; that Wilson and Anderson were negligent in their supervision and inspection of the digging of the sewer trench and in failing to supervise the laying of the sewer pipe; in failing to properly supervise and inspect the backfill of the sewer trench; that they were negligent in their supervision of the tamping of the fill in the trench, in permitting soil to subside beneath the gas main causing said main to break and permitting the gas to escape and spread through the surrounding soil and that they were negligent in not giving proper safety instructions to Dolezal and in failing to provide him with proper tools to carry out his duties and in failing to supply him with a gas metering device to discover the presence of explosive mixtures and that as a proximate result of Wilson and Anderson's negligence, Dolezal entered a manhole where he struck a match and was burned in an explosion which occurred in the sewer; that as a further and proximate result of Wilson and Anderson's negligence, plaintiff sued the Power Company for his injuries and the Power Company was thereby placed in the position where it might be found liable for the injuries sustained by Dolezal as a result of Wilson and Anderson's negligence.

Wilson and Anderson moved for a dismissal of the third party complaint on the ground that 'it is thereby shown that Dolezal and the third party defendants were subject to the Illinois Workmen's

Compensation Law which provides the only remedy permitted plaintiff; that the third party complaint was an attempt to subject Wilson and Anderson as employers to a common law liability not permitted by the Workmen's Compensation Law; that in plaintiff's amended complaint the Power Company is charged with active negligence; and that said third party complaint fails to set forth facts showing the violation of any legal duty owed by Wilson and Anderson to the Power Company.

The court allowed Wilson and Anderson's motion to dismiss the third party complaint and pursuant to Sec. 50(2) of the Civil Practice Act, found that there is no just reason for delaying enforcement or appeal. From this judgment the Power Company has appealed.

The Power Company's theory is that Wilson and Anderson were guilty of active negligence which proximately caused or contributed to cause plaintiff's injuries; that the Power Company, if negligent, was only passively so and therefore is entitled to indemnity from Wilson and Anderson.

The general rule is that the law will not enforce indemnity between actual tortfeasors, the theory being that public policy demands that such wrongdoers shall be left as to each other where their joint offense leaves them. I.L.P. Indemnity. Sec. 12. However, this rule does not apply between parties where one is the active and primary wrongdoer and the other does not join therein but is thereby exposed to liability. In such situation, the parties are not in pari delicto as to each other though as to third persons either may be held liable. ^{Does} Griffiths & Son Co. v. The National Fireproofing Co. 310 Ill.331, 141 N.E. 739; Gulf, M. & O. R. Co. v. Arthur Dixon Transfer Co. 343 Ill. App. 143, 90 N.E. 2d, 783;

Chicago Rys Co. v. R. F. Conway Co. 219 Ill. App. 220.

In the above cases and many others which could be cited, the courts recognized the distinction between a situation where both wrongdoers were equally guilty and where such was not the fact and have held that in the latter case the rule of no indemnity between tortfeasors did not apply. The most recent pronouncement on this subject appears in Moroni v. Intrusion-Prepakt, Inc., et al., 24 Ill. App. 2d, 534; 165 N.E. 2d, 346 decided by the Appellate Court for the First District, where Justice Schwartz speaking for the Court said:

"The rule against indemnity between tort-feasors does not apply between parties, one of whom is the active and primary wrongdoer and the other bears a passive relationship to the cause of the injury. John Griffiths & Son Co. v. National Fireproofing Co. 310 Ill. 331, 141 N.E. 739 (1923); Gulf M & O. R.R. v. Arthur Dixon Transfer Co., 343 Ill. App. 148, 98 N.E. 2d 783 (1951); Dart Transit Co. Inc. v. Wiggins, 1 Ill. App. 2d. 126, 117 N.E. 2d 314 (1953); Palmer House Co. v. Otto, 347 Ill. App. 198, 106 N.E. 2d 753 (1952); Blair v. Cleveland Twist Drill Co., 197 F. 2d 842 (7th Cir. 1952); Pennsylvania R.R. v. Roberts & Schaefer Co., 244 Ill. App. 646 (memorandum decision); Id. 250 Ill. App. 330 (1928); Chicago Rys. v. R. F. Conway Co., 219 Ill. App. 220 (1920). From the foregoing authorities we think the principle stated is now the well settled law of this state. It was thus stated in John Griffiths & Son Co. v. National Fireproofing Co., supra, p. 339:

"The . . . general principle is announced, however, in many cases, that where one does the act which produces the injury and the other does not join in the act but is thereby exposed to liability and suffers damage the latter may recover against the principle delinquent, and the law will inquire into the real delinquency and place the ultimate liability upon him whose fault was the primary cause of the injury,"

citing Lowell v. Boston and Lowell Railroad Corp., 23 Pick.24; Gray v. Boston Gaslight Co. 114 Mass. 149; Washington Gaslight Co. v. District of Columbia, 161 U.S. 316; Union Stock Yards Co. v. Chicago, Burlington and Quincy Railroad Co. 196 U.S. 222.

"For a review of the decisions and the history of the principle, we refer to the opinion rendered by this court in Gulf, M. & O. R.R. v. Arthur Dixon Transfer Co., supra.

"The principle of no contribution and no indemnity between all joint tort-feasors is more a rule of ethics than a principle of law. The law simply closed its door to the inter se disputes of those whom it considered to be bad men. This originated at a time when torts were in the main such wrongs as slander, libel, and assault and battery. Today, torts are mainly the incidents of industry and transportation. To continue to apply the rule to such cases as that before us would make the law no jealous mistress, but a squeamish damsel, refusing to have anything to do with a couple of respectable suitors because her grandfather once told her they were joint tort-feasors."

In their motions to dismiss the third party complaint

Wilson and Anderson allege that in the amended complaint the Power Company is charged with active negligence and therefore has no right to bring in a third party defendant and that the third party complaint fails to state any facts which create a legal duty on the part of Wilson and Anderson towards the Power Company or a violation thereof. For the purpose of testing the sufficiency of pleadings, all well pleaded facts must be taken to be true. Vacos v. LaSalle Madison Hotel Co. 21 Ill. App. 2d 569. Accordingly on this review the fact allegations of the third party complaint must be so taken..

It is alleged in the third party complaint that Wilson and Anderson supervised the construction of a sewer under the Power Company's gas main and that it was their duty to use due care and caution to avoid damaging the said gas main. The complaint then alleges that Wilson and Anderson breached this duty and sets out the facts constituting such breach and that as a result thereof Dolezal was injured. These fact allegations which by the motion to dismiss are admitted to be true are sufficient to show that Wilson and Anderson were under the duty to exercise due care to avoid damaging the Power Company's gas main; that they breached such duty and that such breach resulted in damage to the Power Company for which they seek indemnity.

Wilson and Anderson argue that the rule barring indemnity between tortfeasors applies in this case because the original complaint charges that Dolezal was injured through the faulty manner in which the sewer and gas lines were installed and maintained and therefore the Power Company was guilty of active negligence and a joint tortfeasor. The motion to dismiss raised only the question whether the third party complaint stated a cause of action. The charges of active negligence made against the Power Company in the complaint have been denied and consequently may not be taken as true. The question as to whether the Power Company is guilty as an active tortfeasor as alleged in the complaint must await trial of the issues formed by the amended complaint and the Power Company's answer.

From our review of the authorities we are satisfied that the third party complaint states a cause of action.

We turn now to the question as to whether the Power Company is barred from recovery on its third party complaint by the provisions of the Workman's Compensation Act. It is contended by Wilson and Anderson that under said Act the employer's obligation to pay compensation is the measure of their liability and that they cannot be subjected to any additional liability to the Power Company for damages arising out of plaintiff's injuries. The sections of the Act which it is contended sustain such contentions are: 5(a) and 11, Secs. 138.5(a) and 138.11 Chap. 48, Ill. Rev. Stats. 1959. Sec. 5(a) provides in substance that no action to recover damages for injuries sustained by an employee other than the compensation provided shall be available to any employee or 'to anyone wholly or partially dependent upon him, ^{the} legal representatives of his estate, or any one otherwise entitled to recover damages for such injury.' Sec. 11 provides that such compensation shall be the measure of the responsibility of any such employer. The identical point raised by Wilson and Anderson was decided in the Moroni v. Intrusion case, supra, and the court there said:

"Both parties agree that the precise situation here presented is one of first impression in Illinois, but there is considerable authority in other jurisdictions. We have studied those cases and we are convinced that the Workmen's Compensation Act did not abolish the right of a third party to be indemnified under the principle announced in Griffiths & Son Co. v. Fireproofing Co., supra, and the other cases heretofore cited. The principal cases to support this view are Westchester Lighting Co. v. Westchester County Small Estates Corp., 278 N.Y. 175, 15 N.E. 2d 567 (1938); (also citing a number of cases from other jurisdictions.) The theory upon which this conclusion is reached is stated in Westchester Lighting Co. v. Westchester County Small Estates Corp., supra, as follows at pp. 568-59:

" 'Plaintiff does not sue for damages "on account of" Haviland's death. Plaintiff asserts its own right of recovery for breach of an alleged independent duty or obligation owed to it by the defendant.

" '....

" '....

" 'It may be admitted that if the defendant is held to answer to the plaintiff in this action the result...is that an employer is made liable indirectly in an amount which could not be recovered directly. This consequence, we think, does not decide the issue against the plaintiff. Recovery over against the employer in an unusual case like this need not be rested upon any theory of subrogation. An independent duty or obligation owed by the employer to the third party is a sufficient basis for the action.'

" 'The intention of the legislature when it included the blanket clause of exemption from liability is indicated by the words used in Section 5 abolishing any common law or statutory right to recover for such injuries 'to any one wholly or partially dependent upon him (the injured man), the legal representatives of his estate, or any one otherwise entitled to recover damages for such injury.' It appears to us that this limitation indicates that the legislature had in mind those who might attempt to recover through some relationship with the injured party, and not any one such as the counterclaimant in the instant case, who seeks to recover on a duty separate and apart from that owing to the injured employee."

We are in agreement with the conclusion reached in the Moroni v. Intrusion case and hold that the Power Company's third party action is not barred by the provisions of the Workmen's Compensation Act.

The judgment is reversed and the cause is remanded to the Circuit Court of Champaign County with directions to overrule Wilson and Anderson's motion to dismiss the third party complaint and for such other and further proceedings as may be consistent with the views herein expressed.

Reversed and remanded with directions.

REYNOLDS, P.J. and ROETH, J., concur.

STATE OF ILLINOIS

APPELLATE COURT—THIRD DISTRICT

AT AN APPELLATE COURT, Begun and held for the Third District of the State of Illinois, at

Springfield, on the FIRST TUESDAY in MAY A. D. 1960

PRESENT

HONORABLE C. ROSS REYNOLDS, Presiding Justice

HONORABLE WILLIAM M. CARROLL, Justice

HONORABLE BURTON A. ROETH, Justice

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that afterward, to-wit: On the 18th day of

MAY, A. D. 1960, there was filed in the office of the said Clerk of said Court,

an opinion of said Court, in words and figures following:

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

General No. 10280

Agenda No. 7

Ronald G. Lomelino,)	
Plaintiff-Appellee,)	
vs.)	
Robert Ostermeier,)	
Defendant-Appellant.)	
#)	
#)	
#)	
Robert Ostermeier, Jr., a minor, by Robert)	Appeal from the
Ostermeier, Sr., his Father and Next Friend,)	Circuit Court of
)	Sangamon County
Counter Plaintiff-Appellant,)	
vs.)	
Ronald G. Lomelino,)	
Counter Defendant-Appellee.)	
#)	
#)	
#)	
Martha O. Ostermeier,)	
Counter Plaintiff-Appellant,)	
vs.)	
Ronald G. Lomelino,)	
Counter Defendant-Appellee.)	

Roeth, Justice

On August 17, 1956, at approximately 11:00 P.M., the automobiles driven by plaintiff and defendant collided on State Route 4, about 3 miles south and west of Springfield, Illinois. Plaintiff sued for the personal injuries sustained by him, and

defendant, by his next friend, filed a counterclaim, and the owner of the automobile, defendant's mother, interpleaded and filed her complaint for damage to the automobile. A jury returned a verdict for plaintiff and found him not guilty on both counter-claims. Judgments were entered on these verdicts. Post trial motions were denied and this appeal followed.

Route 4 runs in a general northeast-southwest direction and the collision occurred at the point where the old route, hereinafter referred to as the Branch Road, joins this road. The two roads form a Y junction with Branch Road extending in a general southerly direction from the point where it intersects Route 4. Route 4 is straight for several miles southwest of the junction of the two roads and for about 450 feet northeast, where it curves rather sharply to the northwest. Defendant, who was 18 years old at the time of the accident, was driving in a southerly direction on Route 4 and had one passenger, a young lady who was seated at his right with her head resting on her arm on the back of the seat. Two cars followed the defendant's car. The testimony of the drivers of the two cars is conflicting, as to how far they were behind defendant's car at the time of the accident. Plaintiff was driving northerly alone, and no other vehicle was driving in that direction. Defendant, intending to turn left onto Branch Road, turned on his directional lights some 75 to 100

feet north of the junction. Neither defendant nor his passenger have any recollection of the events occurring from the time defendant signalled to turn and the collision. He testified that he had been traveling 55 to 60 miles per hour until he started into the turn and kept slowing down until he was traveling only 20 to 25 miles per hour; that he was on his side of the road at the time he turned on his directional lights some 75 feet from the junction; that he saw plaintiff's car some distance down the road and knew at least one car was behind him. His next recollection is in the hospital the next day.

Plaintiff testified he was traveling 40 to 45 miles per hour. The headlights on his car were on as he approached the junction and two or three cars were coming toward him; that as he approached the junction defendant's car turned toward him at an odd angle when the two were 30 to 35 feet apart, appearing as though it was making a left hand turn; that defendant's car came into the east half of the road. He testified he swerved to the right, off the road, but was not able to say where the impact took place, on the road or off. He lost consciousness and when he recovered his car was on the east shoulder of Route 4, north of the Branch Road, facing west. Defendant's car stopped in the west lane of Route 4, south of Branch Road, facing north.



A state trooper testified that he observed skid marks on the road north of defendant's car; that he saw glass all over the road, but no debris in northbound lane. He did see mud, dirt, oil and water in the south bound lane, having examined the area shortly after the accident, using a flashlight. He was called by plaintiff, and on cross examination expressed the opinion that the accident occurred in the south bound lane.

A witness for plaintiff testified he was in the second car behind defendant, that he was coming out of the turn north of the junction at the time of the accident and saw the impact. He testified that while he did not see either car prior to the impact, he did observe plaintiff's car in the west lane and defendant's in the center of the highway when the impact occurred. He testified that after the impact the defendant's car spun around and faced to the north; that he applied his brakes with all he had, to avoid striking defendant's car and stopped about a foot from it. On cross examination he stated that he had shortly after the accident signed a statement in which he said that he could not be sure which car was on the center line.

A witness for defendant, driving some 100 to 150 yards directly behind defendant, testified that as he pulled around the curve north of the junction, his lights had not swung around to enable him to see whether plaintiff or defendant was in the wrong



lane. He testified that defendant had his directional lights on; that prior to pulling into the turn, he was traveling 50 to 60 miles per hour and slowed down. This, in substance, was all the testimony relating to the accident. The young lady riding with defendant was unable to shed any light on the occurrence, she being partly asleep at the time.

Defendant raises two points on this appeal, (1) that the court erred in denying defendant's motion for a new trial, alleging the verdict is contrary to the manifest weight of the evidence, and (2) that the court erred in failing to direct a verdict for defendant or in granting defendant's motion for judgment notwithstanding the verdict, on the grounds that plaintiff failed to prove due care and defendant's negligence.

There can be no doubt of the court's duty to set aside verdicts which are clearly against the manifest weight of the evidence. Burns v. Stouffer, 344 Ill. App. 105, 100 N.E. 2d 507. Counsel for defendant uses a partial quotation from the foregoing case upon which to predicate the contention that the verdict here is against the manifest weight of the evidence. The full language of the court is as follows:

"The abstract proposition of law that it is the duty of the court to set aside verdicts which are clearly against the manifest weight of the evidence is not debatable. In Schneiderman v. Interstate Transit Lines, 331 Ill. App. 143, the court, in



reviewing the cases reiterating this rule, analyzed the determinative factors as to whether the verdict of the jury is merely a 'triumph of sympathy over reason.' Thus, where the jury rejects testimony that is uncontroverted, either by positive testimony, or by circumstances, and the witness is not impeached, it is clear that the jurors have acted arbitrarily. (Larson v. Glos, 235 Ill. 584.) For, in the absence of conflicting evidence, the jury should only reject testimony that is inherently improbable, or contrary to the laws of nature, or containing its own impeachment. (Schueler v. Blomstrand, 394 Ill. 600.)"

In the instant case the testimony is conflicting. Neither the defendant nor his two witnesses could say which of the two cars crossed over the center line of the highway. Plaintiff and one witness testified the collision occurred in the north bound lane. On the other hand it is a reasonable inference from the testimony of the state trooper that the impact occurred in the south bound lane. Plaintiff had previously testified, when his deposition was taken, that he did not know on which side of the road the impact took place. He maintained at the trial that he misunderstood the question put at the deposition hearing and had thought he was asked whether he remembered the actual impact. The plaintiff's witness was impeached by a statement he had signed shortly after the accident. Thus in addition to a conflict in the testimony on the trial, there was also a question of credibility of witnesses which the jury had to resolve. Certainly under the circumstances of plaintiff's prior testimony on his deposition and the signed

statement of his witness the jury could well have disregarded the testimony of plaintiff and his witness regarding the occurrence. They were not, however, compelled to do so. It is for the jury to decide the credibility of the witnesses and this court, not having the benefit of seeing the witnesses nor hearing their testimony, cannot say as a matter of law that the jury's failure to disregard this testimony was error. The verdict cannot be said to be against the manifest weight of the evidence.

As to the other contention of counsel for defendant we have repeatedly said that a motion for directed verdict or judgment notwithstanding the verdict presents the single question, whether there is in the record any evidence which, standing alone and taken with all its intendments most favorable to the party resisting the motion, tends to prove the material elements of his case.

No purpose will be served by going over the evidence again. Viewing the evidence with the foregoing rule in mind it may well be said when viewing the evidence most favorable to plaintiff, that defendant, intending to make a left turn, drove his automobile across the center line of the highway into the path of plaintiff's car, at a time when it was unsafe to do so.

Accordingly the judgment of the Circuit Court of Sangamon County will be affirmed.

Affirmed.

Presiding Justice Reynolds and Justice Carroll concur.

STATE OF ILLINOIS

APPELLATE COURT—THIRD DISTRICT

AT AN APPELLATE COURT, Begun and held for the Third District of the State of Illinois, at
Springfield, on the FIRST TUESDAY in MAY A. D. 19⁶⁰

PRESENT

26 I.A. 170^{2d}

HONORABLE C. ROSS REYNOLDS, Presiding Justice

HONORABLE WILLIAM M. CARROLL, Justice

HONORABLE BURTON A. ROETH, Justice

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that afterward, to-wit: On the 18th day of

MAY, A. D. 19⁶⁰, there was filed in the office of the said Clerk of said Court,

an opinion of said Court, in words and figures following:

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

FILED

MAY 18 1960

Robert L. Conn, CLERK
APPELLATE COURT 3rd DIST.

Agenda No. 8

General No. 10281

Jeddiah M. Boyce,

Plaintiff-Appellant,

vs.

Oscar G. Busboom,

Defendant-Appellee.

:
:
: Appeal from the
: Circuit Court of
: Champaign County
:
:
:
:

Carroll, Justice.

This is an action for personal injuries sustained by plaintiff as the result of the alleged wilful and wanton misconduct of defendant in the operation of his automobile. The jury returned a verdict for plaintiff. Defendant's post-trial motion for judgment notwithstanding the verdict and in the alternative for a new trial was allowed and judgment for defendant was entered with a conditional ruling that in the event of its reversal upon appeal, defendant's motion for a new trial was allowed. Plaintiff has appealed.

The sole question presented is whether the trial court erred in granting the post trial motion.

In undertaking consideration of such contention, we are required to adhere to the rule that a motion for judgment notwithstanding the verdict may not be allowed if there is any evidence taken with its intendments most favorable to plaintiff which tends

to prove his complaint. Such rule is well established and varying only as to the language employed has been announced in a myriad of cases. In Lindroth v. Walgreen Co. 407 Ill.121, 94 N.E. 2d 847, it is thus concisely stated:

"A motion for directed verdict or for judgment notwithstanding the verdict presents the single question whether there is in the record any evidence which, standing alone and taken with all its intentions most favorable to the party resisting the motion, tends to prove the material elements of his case."

The weight or credibility of the evidence or presence of conflicts therein are of no concern to the court. As was said in Hughes v. Bandy, 404 Ill. 74, 87 N.E. 2d, 855:

"No contradictory evidence, or other evidence of any kind or character, will justify a directed verdict or a judgment for defendant notwithstanding the verdict, except uncontradicted evidence of facts consistent with every fact which the evidence for the plaintiff tends to prove, but showing affirmatively a complete defense". . .

"Neither the trial court, nor a court of review, should weigh the evidence or determine where its preponderance lies."

Accordingly upon this review proof unfavorable to plaintiff cannot be considered. The determination to be made is whether there is any evidence viewed in the light most favorable to the plaintiff upon which the jury could base its verdict.

On October 30, 1954, plaintiff, who was in the Air Force, lived in Rantoul, Illinois. Between 7:20 and 7:30 P. M. on that day he drove his car south from Rantoul on Route 45. He was accompanied by Ruth Elizabeth Boyce, his wife, and two Air Force friends identified only as Neal and Porter. It was their intention to attend a movie located on Route 45 north of Urbana. Enroute

the car motor became overheated and plaintiff stopped at Jay's Ranch, a business place on Route 45, where one of the Airmen obtained a bucket of water to cool the engine. Because of the overheating of the car, the party then decided to return home instead of continuing on to the movie theatre. Plaintiff drove south from Jay's Ranch to a cross-over where he crossed the median strip and turned north into the easterly north bound lane of Route 45. After going north about 150 feet and when directly opposite Jay's Ranch the car stalled. Plaintiff and the two Airmen alighted from the disabled vehicle and tried to push it off the highway. While they were thus engaged, defendant's car approaching from the south struck plaintiff's car in the rear. As a result of the collision plaintiff suffered serious personal injuries. Since no question as to the amount of the verdict is raised, we omit further reference to such injuries.

Ruth Elizabeth Boyce testified and in her language stated: "as we turned north on Route 45 there was nothing apparently wrong with our vehicle at that time. The car had just stopped. There was no warning." She further testified that plaintiff tried to start the car twice; that it would not start; that plaintiff and the two Airmen got out to push it off the road; that there were lights on the Boyce car at all times; that the two Airmen went back of the car and plaintiff was by the door trying to push; that she slid over into the driver's seat to hold the steering wheel which her husband had turned to the right; that prior to the collision one car going north passed the stalled vehicle and that she saw the lights on Jay's Ranch.

James L. Nutt testified that between 8 and 8:15 P. M. on the night of the occurrence, he was driving north on Route 45 and when almost directly in front of Jay's Ranch he passed a stalled car; that as he passed he saw a man at the driver's door and another man behind the car; that there were two red tail lights operating on the stalled car; that he first saw the car when he was 200 to 300 feet away; that it was in the east lane heading north and was 2 or 3 feet to the right of the center line; that there was illumination on it from the parking lots of Jay's Ranch; and that when he saw the stalled car he pulled over into the left lane and passed.

James E. Evans testified that just prior to the accident he was driving north on Route 45; that at a point approximately 1000 to 1200 feet south of a small cross-over to Jay's Ranch, he was passed by a car which he later learned was that of the defendant; that witness was then going 45 miles per hour which was the posted speed limit on Route 45 in that area; that he observed the speed of defendant's car; that in his opinion it was going approximately 55 to 60 miles per hour; that after defendant's car passed it came back into the east section of the north bound lane and its tail lights were visible to him; that the next thing he noticed was a cloud of dust and he then started to slow down; that he proceeded north until he got within 50 feet of a car sitting on the highway; that he pulled to the left and parked beyond the stopped car; that the car sitting on the highway was that of defendant; that plaintiff was lying in the road about 20 feet south of and in the same traffic lane as was defendant's car; that plaintiff's car was off

the highway to the east 40 to 50 feet north of defendant's car and was at an angle to the concrete portion of the highway; and that its tail lights were lighted. This witness further testified that his lights would illuminate the road about 250 feet; that the pavement was dry; that he applied his brakes when he came upon the scene and did not lock his wheels and that he observed straight skid marks behind the Busboom car.

The defendant testified that his car stopped when it hit the other car; that when it stopped his car was directly over the black line with the wheels evenly dividing it; that the right front half of his car struck the left rear half of the Boyce car; that his skid marks extended approximately a foot west of the center line varying from a straight line approximately 6 to 9 inches and were about 20 paces in length; that he was afraid of oncoming cars; that thereason he did not turn left when he first saw the Boyce car was because he thought there had been some kind of an accident and there might be persons to the left of the car; that he first saw the Boyce car when he was 80 to 100 feet behind it; that his headlights were on dim; that he immediately applied his brakes and skidded into the Boyce car; that he had not changed the speed of his car at any time in the 1000 or 1500 feet before the impact; that he saw three people behind the Boyce car who remained there until he collided with it; and that he had his car under control and could stop within the range of vision of his lights.

The foregoing is substantially the evidence most favorable to plaintiff and it must be taken as true. Conflicts therein or its weight or the credibility of the witnesses may not be considered.

If such favorable evidence with all reasonable inferences to be drawn therefrom tends to sustain the charge of wilful and wanton misconduct as laid in the complaint, then defendant's motion for judgment notwithstanding the verdict should have been denied.

On numerous occasions our Supreme Court has stated that no hard and thin line definition of wilful and wanton misconduct should be attempted. It's reasoning in that respect appears in Myers v. Krajefski, 8 Ill. 2d 322 where it is said:

"Defendant urges that the definition of wilful and wanton conduct contained in the case of Schneiderman vs. Interstate Transit Lines Inc. 394 Ill. 369, is erroneous". . .

"We have examined the various cases cited by defendant, and while it is to be noted that in many instances different wording, language and terminology is employed by the different courts in various instances, the basic general concept of the term as applied to the facts in the particular cases has remained essentially the same. The basic element in all of these cases indicates that liability can be founded under such a cause of action where the act was done with actual intention or with a conscious disregard or indifference for the consequences when the known safety of other persons was involved. The knowledge concerning other persons can be actual or constructive. As indicated by the decisions of other States which do not employ this term, it is generally considered in that area of fault between ordinary negligence and actual malice. In view of the fact that it is a matter of degree a hard and thin line definition should not be attempted. As stated in Mower v. Williams, 402 Ill. 1, 24. 'as to whether or not there has been wilful and wanton conduct in any given case necessitates close scrutiny of the facts as disclosed by the evidence, and while the rule of law does not vary, the facts to which the law is applicable always present divergent circumstances and facts which, in most instances, are wholly dissimilar.'"

In Hering v. Hilton, 12 Ill.2d 559, the court adhering to the position taken in the Myers case, said:

"Wilful and wanton misconduct has been defined in myriads of cases, each one reiterating or embellishing the phraseology of its predecessors. (Streeter v. Humrichouse, 357 Ill. 234; Bartolucci v. Falletti, 382 Ill. 168; Schneiderman v. Interstate Transit Lines, Inc., 394 Ill. 569; Mower v. Williams, 402 Ill. 486; Myers v. Krajefski, 8 Ill. 2d 322, 328). One often quoted definition is that set forth in Schneiderman v. Interstate Transit Lines, Inc., 394 Ill. 569, at p.583: 'A wilful or wanton injury must have been intentional or the act must have been committed under circumstances exhibiting a reckless disregard for the safety of others, such as a failure, after knowledge of impending danger, to exercise ordinary care to prevent it or a failure to discover the danger through recklessness or carelessness when it could have been discovered by the exercise of ordinary care.' In the recent case of Myers v. Krajefski, 8 Ill. 2d 322, this court refused to overrule that definition. The court noted that although there are some variations in the phraseology of the definitions of wilful and wanton misconduct in the cases, the basic concept as applied in the case law is the same, and since such conduct is usually a matter of degree, no hard-and-thin-line definition could be made."

Accordingly in examining the evidence our objective is the determination as to whether the conduct of defendant while falling short of actual malice constituted negligence of a degree which rendered it wilful and wanton misconduct. Evidentiary facts appearing to be pertinent on such inquiry are that the place where the Boyce auto was standing was illuminated by the lights from Jay's Ranch; that the tail lights of the Boyce automobile were burning; and it was entirely within the right-hand traffic lane; that defendant's speed was 55 to 60 miles per hour in a zone posted for a speed limit of 45 miles per hour; that the Nutt car passed to the left of the stalled Boyce car without incident; that Nutt saw the Boyce car

when he was 200 to 300 feet behind it and saw a man opposite its left front door; and that the witness Evans saw the Boyce car and had no difficulty pulling to its left and stopping. On this evidence we think the jury was warranted in concluding that there was no apparent reason for defendant failing to discover the danger of a collision with the Boyce car, or if he was aware of such impending danger he failed to do anything to avert the collision which ensued. Admittedly, it cannot be successfully maintained that there was a complete absence of evidence fairly tending to prove the charges of wilful and wanton misconduct as made in the complaint. The defendant admitted that he was alerted to the existence of danger when he saw the stalled automobile and the men behind it and whether under the circumstances he took reasonable precautions to avoid a collision was a question to be determined by the jury. This court is not permitted to weigh the evidence and whether we agree or disagree with the jury's conclusion is of no consequence.

Having reached the conclusion that the trial court's ruling on the motion for judgment notwithstanding the verdict was erroneous, this court, pursuant to Section 68.1 of the Civil Practice Act, is required to review and determine the conditional ruling allowing the motion for a new trial.

The only reference to the propriety of such conditional ruling found in the briefs is that made by plaintiff who raises and argues the point that the verdict of the jury should not be disturbed because it is not manifestly against the weight of the evidence. Defendant has not seen fit to answer such contention nor does the

record disclose the trial court's reason for the conditional allowance of the motion for a new trial. In sustaining defendant's motion for judgment notwithstanding the verdict, the trial court ruled that there was a failure of evidence to prove one or more of the essential elements of plaintiff's case. Therefore, it may be rightfully assumed that in passing upon the post-trial motion the trial court was concerned only with the sufficiency of the evidence and by its conditional ruling in effect decided that if the case was properly submitted to the jury then the verdict was against the weight of the evidence.

After careful consideration of the record we are of the opinion that the verdict finds ample support in the evidence and that the conditional ruling was erroneous.

The judgment of the Circuit Court of Champaign County is reversed and the cause is remanded with directions to enter judgment on the verdict.

Reversed and remanded with directions.

REYNOLDS, P.J. and ROETH, J., concur.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT - SECOND DIVISION
FEBRUARY TERM, A.D., 1960

JOAN REESE,
Plaintiff-Appellant,

-vs-

PAGE REESE,
Defendant-Appellee.

Appeal from
Circuit Court
Winnebago County.

26 T.A. 244

CROW, J.

This is an appeal from an order entered May 20, 1959 by the Circuit Court of Winnebago County in a divorce case modifying a prior order of December 2, 1957. The order of May 20, 1959 modified the visitation rights of the defendant-appellee, Page Reese, as to his daughter, Paula Reese, age 7 years. The material portions of the order appealed from found the home of the defendant to be a fit and proper place for the child to visit, and provided as follows:

"IT IS, THEREFORE, ORDERED by the Court as follows:

- a. That the defendant shall have the following visitation rights as to his daughter, Paula Reese:
 1. The first Saturday of each month from 3:30 p.m. until 7:30 p.m.;
 2. An overnight weekend visitation once a month beginning on the third Saturday in each month from 2:00 p.m. and continuing until 5:30 p.m. the following day (Sunday);

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3. Christmas Day from 8:30 a.m. until 12:30 p.m.;
4. February 4 from 4:30 p.m. until 7:30 p.m.;
5. A summer visitation beginning on August 1 at 1:30 p.m. and continuing until August 15 at 6:30 p.m.;"

The prior order of December 2, 1957, which was itself a modification order, had found the home of the defendant to be a fit and proper place for the child to visit, and had established visitation rights for the defendant as follows:

- "1. The first Saturday of each month from 3:30 P.M. until 7:30 P.M.;
2. The third Sunday in each month from 12:30 P.M. until 7:30 P.M.;
3. Christmas Day, from 8:30 A.M. until 12:30 P.M.;
4. February 4, 1958, from 4:30 P.M. until 7:30 P.M."

As a result of the Order of May 20, 1959, the only changes actually effected from the order of December 2, 1957 are: (1) a summer visitation by the defendant father beginning on August 1, at 1:30 P.M. and continuing until August 15 at 6:30 P.M., and (2) where formerly the defendant had a visitation period with the child the third Sunday in each month from 12:30 p.m. until 7:30 p.m., he was, in lieu thereof, given an over-nite week-end visitation beginning the third Saturday in each month from 2:00 p.m. until 5:30 p.m. the following day (Sunday).

The plaintiff-appellant, Joan Reese, the mother of the minor child, bases her appeal on the theory that the original decree, which was entered February 20, 1953, as modified

by the Order of December 2, 1957, was res adjudicata; the defendant's present motion to modify custody is insufficient to invoke the jurisdiction of the Court; the failure of the defendant to reply to the plaintiff's answer to the present motion admits the facts alleged in the plaintiff's affirmative defenses; the evidence is insufficient to support the order of May 20, 1959; the Court abused its discretion in modifying the decree with respect to custody; the order of May 20, 1959 is against the manifest weight of the evidence and is contrary to the best interest of the child; the Court made no findings of changes of circumstances indicating that the welfare of the child demanded a modification of the order as to the matter of custody; and the welfare of the child demanded a limitation rather than an expansion of custody privileges by the father.

The defendant-appellee's theory is that the order of May 20, 1959 was not strictly a modification of any former visitation program established by the trial court, but merely a continuation of a previous proceeding in which the Court had ordered a minimum program of visitation and had indicated that such program would be lengthened as the child became older, and the Court did not abuse its discretion in establishing the present program of visitation.

The plaintiff and defendant were married June 16, 1950 and were divorced on the plaintiff's complaint by a decree of February 20, 1953, on the grounds of cruelty. The decree provided that the plaintiff should have custody of the child, Paula Reese, then one year of age, born February 5, 1952, and that the defendant should have "the right to visit said child at all

reasonable times." On November 3, 1953, after the original decree, Page Reese, the father, filed a petition for modification of decree asking that it be modified to establish with definiteness and certainty regular times and places that he could visit his child. This was done, after a hearing, by an Order of November 13, 1953, which provided for visitation at the plaintiff's home Sunday mornings for one hour at 9 a.m., or upon reasonable notice and request for visitation on occasional Sunday mornings at the home of the paternal grandparents for approximately one hour, that order finding that there had been numerous disagreements as to the reasonable times and places of visitation, and that it was to the best interests of the child that the times and places of visitation be established by the Court with certainty. That remained unchanged until the further order of December 2, 1957, the terms of which have heretofore been set out, and which arose out of a further motion by the defendant to modify the decree, the plaintiff's answer thereto, and a hearing thereon. Evidently, however, no evidence was heard on that occasion and the order of December 2, 1957 seems to have been finally arrived at more or less by acquiescence, at the Court's suggestion. The abstract, for example, shows an agreed pretrial conference, December 2, 1957, at which both parties were present, and the Court made the following observations, in part - "I am setting a minimum at this time, in my opinion, what is the minimum, as far as your client is concerned. He is getting the minimum at this time. * * * Continue the question of vacation. * *

I would say this, that on the question of summer vacation, it will be reserved by the ruling here, that you can notice him in when you get ready to bring the matter up. I said June. It may be May. Somewhere prior to the vacation period." It was ev-

idently at least partially in response to this suggestion that the defendant, Page Reese, on May 2, 1959, filed his present motion to modify decree with reference particularly to a summer vacation period, and other visitation periods during the month, asking the court to fix a definite period for visitation during the summer months, and increasing certain other visitation privileges during the month. The plaintiff filed an answer to the defendant's motion, admitting or denying the allegations, and setting forth three alleged affirmative defenses, the first that it is for the best interests of the child that custody and visitation be continued as in the order of December 2, 1957, the second that the order of December 2, 1957 was a final order and the facts and circumstances have not since changed, and the third that prior to the divorce the parties were separated and the defendant made no effort to visit the child, the plaintiff believes the defendant's insistence upon visitation is more calculated to harass her than to cultivate the affection of the child, and the defendant has especially since the plaintiff's remarriage been entirely uncooperative regarding visitations. The defendant filed no reply to the alleged affirmative defenses. It was after a further hearing on this motion and answer that the present Order of May 20, 1959 was entered.

The plaintiff was remarried on August 17, 1957, to Eugene S. Swanson, and the defendant Page Reese was also remarried on June 25, 1955, to Jean Reese. There was no dispute that Page Reese was a fit father, that the child loves him, and has a good time when in his home. She is in the first grade. He treats the child well and there is no question raised about his

reputation or the suitability of his home. He and his present wife are members of and attend a church regularly, he belongs to various social, civic, or business clubs, and is President of a paint company. At the time of the prior order of December 2, 1957 the defendant and his present wife were living in an apartment consisting of one bedroom, living room, dining room, and kitchen. At the time of the present order of May 20, 1959 the defendant and his wife lived in a house consisting of a living room, dining room, kitchen, breakfast nook, three bedrooms, two baths. At that time also the defendant and his present wife had a six months old daughter of their own. They live in Rockford. Paula has never been with the defendant father overnite. The plaintiff and her present husband also live in Rockford, they have no children of their own, the stepfather loves Paula and treats her as his own daughter. The child Paula enjoys playing with the defendant's and his present wife's 6 months old daughter, she doesn't like to leave after the visits, and would like to stay longer on those occasions. If she stayed overnite at the defendant's home she'd have her own bedroom and toys. The defendant's present wife is a former first grade school teacher. She is fond of Paula, Paula seems to like her and calls her Jean, but she does not try to assume the role of mother. The Church ministers of both the plaintiff and the defendant had in November, 1957 counselled with both of them concerning the father's visitations and both ministers had recommended visitations of two week-ends a month, plus an overnite privilege, plus a month in the summer time. Paula has some tenseness for a short while at the beginning and conclusion of visits.

At the hearing, in addition to the testimony of the plaintiff, the defendant, their present respective spouses, the defendant's minister, and one of the defendant's business acquaintances, a clinical psychologist, though not a doctor, who had examined Paula Reese on two different occasions, in November, 1957 for about an hour and in May, 1959 for about an hour, and had given her certain formal tests, testified that Paula was a disturbed child, having some instability, because of the increased conflict and intense strife between the defendant and the stepfather, the present husband of the plaintiff mother, and the psychologist recommended that the visitation privileges by the defendant father be, if anything, limited.

This case does not involve a change of custody from the plaintiff mother, with whom such custody was vested by the original decree. It involves, at most, a modification, if it may be properly called that, of the defendant father's visitation rights, the original decree having given him "the right to visit said child at all reasonable times," - or, perhaps more accurately, it involves a particularization or spelling out of the defendant father's visitation rights to a somewhat greater extent than had theretofore in practice been exercised. And the modification, if it be that, or particularization or spelling out, if it be that, of the visitation rights effectuated by the order of May 20, 1959, as distinguished from the last prior order of December 2, 1957, is only to the extent of giving an overnite week-end visitation the third Saturday in each month from 2 p.m. to the following Sunday at 5:30 p.m. in lieu of a visitation on the third Sunday in each month from 12:30 p.m. to 7:30 p.m., and

to the extent of giving a summer visitation from August 1st to 15th. Those are the only changes, if they may properly be termed changes, made by the order of May 20, 1959 in the defendant father's visitation rights.

The statute relating to divorce provides, in part, CH. 40, ILL. REV. STATS., 1957, par. 19: " * * * * The Court may, on application, from time to time, make such alterations in * * the care, custody and support of the children, as shall appear reasonable and proper."

[The Court had the right and jurisdiction to settle any questions concerning custody, or visitation, in the first instance, and it continued to have the right to reconsider those questions upon proper application and to make changes in its order whenever new conditions warranted it under the evidence, as the best interests of the child demanded, the welfare of the, child being preeminently the thing to be considered, the right to modify the decree in those respects from time to time as shall appear reasonable and proper being expressly given by the statute and having been frequently sustained: STAFFORD v. STAFFORD (1921) 299 Ill. 438. The decree is res judicata and final as to the facts in these regards which exist at the time it is entered but not as to facts arising thereafter; material new or changed conditions affecting the welfare of the child must have arisen to warrant a change in a prior determination of this character; the trial court has a large discretion in such matters, and perhaps an even greater discretion in altering visitation privileges, though such is a judicial discretion and is not unlimited; but a Court of review should not reverse the trial

court's factual findings in such instances unless they are clearly against the manifest weight of the evidence; and a sincere manifestation of interest in the child by the parent who does not have permanent custody should be encouraged, not discouraged: NYE v. NYE (1952) 411 Ill. 408; MAUPIN v. MAUPIN (1950) 339 Ill. App. 484; WADE v. WADE (1951) 345 Ill. App. 170; DUNNING v. DUNNING (1957) 14 Ill. App. (2) 242; KENT v. KENT (1942) 315 Ill. App. 284; HARMS v. HARMS (1944) 323 Ill. App. 154; ISRAEL v. ISRAEL (1956) 8 Ill. App. (2) 284; TOSH v. JONES (1954) 1 Ill. App. (2) 215, - all of which cases are cited by the plaintiff here.

In MAUPIN v. MAUPIN, supra, the Appellate Court reversed and remanded an order changing the custody of a girl, 3 years old, to the mother, after the original decree had given the custody of the girl and a boy, 2 years old, to the father. In WADE v. WADE, supra, the Appellate Court affirmed an order denying a petition to modify a decree which had given custody of a 7 year old girl to the father. In KENT v. KENT, supra, the Appellate Court affirmed an order modifying a decree so as to give custody of a boy, 7 years old, to the father. In TOSH v. JONES, supra, the Appellate Court affirmed an order modifying a decree and prior order so as to give custody of a boy to the father.

In BATES v. BATES (1897) 166 Ill. 448 the Supreme Court affirmed a judgment of the Appellate Court affirming an order modifying a decree so as to give the father custody of a boy, 6 years old, from each Friday at 5 p.m. to each Saturday following at 5 p.m., the mother to have custody the remaining 6 days of each week, - the original decree having given the

mother sole custody. The Court commented, p. 449-450, that:

" * * * Considering all the evidence, we see nothing to indicate that the child would be injured by being in his company for one day in each week. * * It was the right of the father to see his child at proper times, and to secure and return his affection, if possible. We think that the order was a proper one."

In RUBERTS v. RUBERTS (1955) 4 Ill. App. (2) 134 we affirmed an order modifying a decree so as to permit visitations by the father in his own home with two minor children for a month in the summers and two days each in October and March, the mother continuing to have general custody, - the original decree having given the mother custody and allowed the father to visit the children at the home of the mother at all times consistent with their education and health. We pointed out that the order related only to the subject of visitation, not custody, was a modification of the visitation privilege, not a change of custody, did not materially abridge the mother's rights to custody, and the trial Court "should be allowed broad discretion when the question of altering visitation privileges is involved."

In AKIN v. AKIN (1949) 337 Ill. App. 648 (abstract decision) the Appellate Court affirmed an order modifying the father's visitation rights under a decree so as to permit the father to have a 33 months old boy in his home every third week-end and keep him overnite and to have an 11 months old boy also every third week-end but not overnite, the general custody remaining with the mother, as the original decree had provided, that decree having provided for visitations at the father's home or mother's home every sixth Saturday for three hours as to the

older boy or a few minutes as to the younger boy, the Court commenting that the remarriage of the mother was properly considered in revising the father's visitation privileges.

In BERGER v. BERGER (1951) 344 Ill. App. 557 (abstract decision) the Appellate Court affirmed an order reinstating a prior order giving the father custody of a child on alternate week-ends and said such was not an abuse of discretion.

In GALTER v. GALTER (1936) 287 Ill. App. 623 (abstract decision) the Appellate Court affirmed an order modifying a decree so as to increase the father's rights to visit the minor child, whose general custody was with the mother, and giving the father custody at a specified time each month and in the summer, and held such not to be an abuse of discretion, commenting, in part, that the mother's new husband (she having remarried) had abused and threatened the father on his visits to call for the child.

MALONE v. MALONE (1955) 5 Ill. App. (2) 425, STARK v. STARK (1955) 7 Ill. App. (2) 442, MARTINEC v. SHARAPATA (1946) 328 Ill. App. 339, BROWN v. BROWN (1957) 13 Ill. App. (2) 56, and CALLAN v. CALLAN (1955) 5 Ill. App. (2) 480, also referred to by the plaintiff, do not appear to be helpful. ERICKSON v. ERICKSON (1951) 344 Ill. App. 550 (abstract decision) held it was an abuse of discretion to increase a mother's partial custody of an 11 year old boy from alternate week-ends to three consecutive week-ends out of every four, - such is not the case at bar. And RIDGE v. RIDGE (1954) 1 Ill. App. (2) 226 (abstract decision) and (1955) 5 Ill. App. (2) 479 (abstract decision) involved facts not particularly similar to those here concerned and dispositions as to the

mother's visitation rights with or partial custody of the 8 year old boy which bear only a partial resemblance in some respects to the dispositions here involved and which included several features not here presented, - in fact the ultimate result in the Appellate Court in the last case, 5 Ill. App. (2) 479, which affirmed in part and reversed in part an order of the trial court, is about as favorable to the views of the defendant here as of the plaintiff.

Each case in this field depends greatly on its own particular facts, and, necessarily, none of the foregoing are exactly like the present case either on their facts or on the dispositions as to the child involved, but BATES v. BATES, RUBERTS v. RUBERTS, AKIN v. AKIN, BERGER v. BERGER, and GALTER v. GALTER are, we think, the most closely analogous, under the circumstances.

That the defendant did not file a reply to the plaintiff's answer to the defendant's present motion did not have the effect of admitting any "facts alleged in the plaintiff's affirmative defenses", by analogy to CH. 110, ILL. REV. STATS., 1957, pars. 32, 40, - none of the matters in the affirmative defenses are "new matter by way of defense" to which a reply was necessarily required; most of the matters therein are allegations of legal conclusions and opinions; some are irrelevant and immaterial; to the extent any of the allegations are proper as a matter of pleading they add nothing to the answer and any evidence thereof was admissible under the other parts of the answer and motion; and the matters therein are not of the type normally considered "affirmative defenses" under CH. 110, ILL. REV. STATS., 1957, par. 43. Cf. CITY OF FLORA etc. v. BRYDEN (1938) 300 Ill. App. 1.

Since the decree of February 20, 1953, among other material facts and circumstances affecting the welfare of the child, each to a greater or lesser degree, the child, born February 5, 1952, has grown older, being only 1 year old at the time of the decree, about 1½ years old at the time of the order of November 13, 1953, about 5½ years old at the time of the order of December 2, 1957, and about 7 yrs. 3 mos. old at the time of the order of May 20, 1959; the plaintiff mother has remarried; she and her present husband have no children of their own; the defendant father has remarried; he and his present wife have a six months old child of their own, born about December, 1958; the defendant father and his present wife lived in a moderate sized apartment December 2, 1957; they lived in a somewhat larger house May 20, 1959, perhaps somewhat more suitable, under the circumstances, for visits by the child; the ministers of both parties made some recommendations as to possible visitation rights by the defendant father in November, 1957 which were more favorable to the father than those given by the orders of either December 2, 1957, or May 20, 1959; and the psychologist's report indicates some disturbance in the child because of conflict and strife between the defendant father and the plaintiff's present husband. The trial Court undoubtedly gave consideration to all of those matters.

Considering the nature of what is here involved, - a modification, or particularization or spelling out, of the defendant father's visitation rights, - the relatively limited changes, if they are properly denominated changes, made by the

order of May 20, 1959, that the Court evidently thought the prior order of December 2, 1957 provided substantially the minimum as to the father's visitation rights and the matter of a possible summer vacation visitation was to be continued or reserved at that time and brought up later, and all the facts and circumstances in evidence, the trial Court's conclusions are not clearly against the manifest weight of the evidence and are not an abuse of the rather large discretion of the Court in relation to visitation privileges. The order of May 20, 1959 will, accordingly, be affirmed.

A F F I R M E D .

Wright, J. Concurs

Selfisburg, P.J. Concurs

FILED JUNE 20, 1960

NO. 11325

(Abstract only)

Agenda 1

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT, FIRST DIVISION
FEBRUARY TERM, A.D. 1960

S. HARVEY KLEIN, Trustee in
Bankruptcy for PATRICK H. BLAKE,

Plaintiff-Appellee,

vs.

RUDY S. HANS,

Defendant-Appellant.

Appeal from the

Circuit Court,

Kane County.

26 LA 253

MONEAL, P.J. --

This is an appeal from a judgment entered by the Circuit Court of Kane County against the defendant, Rudy S. Hans, because of an alleged breach of contract wherein the defendant agreed to purchase Patrick H. Blake's tobacco business. The judgment was entered on a verdict for \$10,000 against Hans. Defendant's post trial motions were denied and this appeal followed.

In January of 1955, the plaintiff, Blake, owned and operated a wholesale tobacco business under the name of "Schickler Wholesale". He placed an advertisement in the Chicago Tribune for the sale of this business and as a result, a written instrument was signed by the parties on February 14, 1955, wherein Blake agreed to sell and the defendant, Rudy S. Hans, agreed to buy the business for \$20,000 plus inventory, the sale being contingent on Blake's income tax return for 1954 showing gross sales of at least \$750,000. Later Hans noted on the contract at the paragraph containing this contingency, the words: "Figures submitted are acceptable - Rudy S. Hans."

On March 7, 1955, Hans' attorney, Meyer, appeared at Blake's place of business and started to take an inventory of the merchandise.

Hans arrived about thirty minutes later and, after a conference with his attorney, Meyer said that Hans did not want to go through with the deal, and they left.

On April 29, 1955, Blake filed his complaint against Hans alleging a breach of the contract and claimed \$25,000 damages. Defendant Hans filed his answer and counterclaim for \$1,000, the amount paid by him as earnest money. In October, 1955, Blake was adjudicated a bankrupt and his trustee was substituted as plaintiff in the case. The cause was tried by a jury, which found for the plaintiff and assessed his damages at \$10,000. Judgment was entered on the verdict and defendant appealed.

Appellant contends that the instrument sued on was not a contract of sale, but at most an option to purchase, which had not been accepted; that Blake failed to comply with the Bulk Sales Act, thereby rendering the instrument sued upon unenforceable; that damages in the amount of \$10,000 were not proven; that the court erred in refusing to give the proper form of verdict for the recovery of the \$1,000 under defendant's counterclaim; and that the court erred in overruling defendant's motion for directed verdict.

We find no merit in appellant's contention that the instrument sued upon was not a contract of sale but rather an option to purchase. A reading of this instrument, which was drafted by appellant's attorney, Meyer, can lead to but one conclusion, and that is that the instrument is a contract of sale and not an option. The instrument is entitled: "Agreement for Sale and Purchase of 'Schickler Wholesale'." After some preliminary paragraphs identifying the parties and their respective desires to sell and purchase the business in question, the instrument reads: "Now, Therefore, it is agreed between the parties hereto as follows: Patrick H. Blake does hereby offer to sell to Rudy S. Hans the business known as 'Schickler Wholesale' . . . for the sum of Twenty Thousand Dollars (\$20,000.00) which . . . shall include trade name and

good will of said business, and to sell at cost the inventory and merchandise on hand, plus such trucks as the purchaser desires at a price to be agreed upon between the parties hereto, plus such office equipment . . . and other equipment at a price to be agreed upon between the parties hereto. Rudy S. Hans does hereby agree to purchase said business, good will, trade name, inventory and equipment as above stated at the price aforementioned."

It is elementary that an offer by one party, and an acceptance of such offer by another, constitutes a binding contract. This instrument was more than a mere unilateral offer by the seller. The buyer agreed "to purchase" the business. Anything that amounts to a manifestation of a formal determination to accept, communicated to the party making the offer, doubtless completes the contract. 12 Am. Jur. 532, Contracts Par. 39. Obviously, Hans' acceptance in writing of the terms of Blake's written offer to sell, completed the contract.

Appellant contends that since the plaintiff failed to comply with the Bulk Sales Act, he cannot now enforce the instrument sued upon. The Bulk Sales Act (Par. 78, Ch. 121½, Ill. Rev. Stat.) provides, in part, as follows: "That the sale, transfer or assignment in bulk of the major part or the whole of a stock of merchandise, or merchandise or fixtures or other goods and chattels of the vendor's business, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the vendor's business shall be fraudulent and void as against the creditors of the said vendor . . ."

The purpose of the Bulk Sales Act was to provide protection to creditors of a vendor who was about to dispose of the whole or major part of his stock in trade. As to such creditors, if the provisions of the act were not complied with, the sale was voidable. But whether the act was complied with or not, the contract of sale was an enforceable contract between the vendor and vendee. C. & E. Marshall

Co. v. Leon, 267 Ill. App. 242, 246; Goldstein v. Greenstone, 223 Ill. App. 511, 514; Wende v. Zimmer, 189 Ill. App. 490. Further, the agreement expressly provided that \$10,000 of the purchase price should be paid upon delivery of a bill of sale, bulk sales affidavit, lease, etc. On March 7 Hans' attorney said to Blake: "I am sorry, we have no deal. Mr. Hans does not want to go through with it. I do not know why." From this statement the jury could have concluded that Hans intended to breach the contract and that Blake was thereafter relieved of any obligation to furnish a bulk sales affidavit, bill of sale or lease, since it was apparent that Hans had refused to complete his part of the contract. The trial court properly refused defendant's tendered instructions which quoted in full the provisions of the first section of the Bulk Sales Act.

Defendant next contends that damages in the amount of \$10,000 were not proven to have been sustained by the plaintiff. The measure of damages in a case of a breach of contract is the amount which will compensate the injured person for the loss which a fulfillment of the contract would have prevented. The person injured is, so far as it is possible, to do so by a monetary award, to be placed in the position he would have been in had the contract been performed. The instrument in question provided for the sale of a tobacco business for the sum of \$20,000. Other than the \$1,000 paid by the defendant as earnest money, and \$300 received in July, 1955, for a list of customers' names after the business had deteriorated, plaintiff realized nothing by reason of the contract. The jury heard the evidence and was in a better position than this court to ascertain what, if any, damages the plaintiff suffered by virtue of the defendant's non-performance. It was their conclusion under the evidence that plaintiff's damages amounted to \$10,000. There is nothing in the record that would warrant this court in substituting its judgment for that of the jury.

As a part of his amended answer, defendant also filed a

counterclaim which incorporated certain paragraphs of his answer and stated that as a direct result of the fraudulent, wilful and deceitful conduct on the part of Patrick H. Blake to deceive and defraud counter plaintiff, he has been damaged to the extent of \$1,000, representing the earnest money he paid to Blake on the contract. At the time the contract was signed, defendant did make a payment of \$1,000 to the plaintiff which was to be applied upon the purchase price. Defendant claims that the court erred in refusing to give to the jury a form of verdict concerning the recovery of this \$1,000. As can be seen, defendant predicates his claim for the \$1,000 on the basis of fraud and deceit. There is no evidence in the record of any fraud or deceit on the part of the plaintiff. Such being the case, the court did not err in refusing to give such a form of verdict. Defendant's counterclaim failed for lack of evidence. The jury was aware of the payment of the \$1,000 and could well have considered this amount in arriving at the amount of plaintiff's damages.

Defendant's final contention is that the court committed error in refusing defendant's motion for a new trial. Some of the points mentioned in defendant's motion have been covered here. With respect to the others, we find no error. The judgment of the Circuit Court of Kane County is affirmed.

Affirmed.

DOVE, J. Concur's

SMITH, J. Took No Part

FILED JUNE 2, 1960

NO. 11322

(Abstract only)

Agenda 13

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT, FIRST DIVISION
OCTOBER TERM, A. D. 1959

CAROL BAUCH, a minor, by Priscilla D.
Bauch, her grandmother and next friend,

Plaintiff-Appellant,

vs.

BEE LINE SERVICE, INC., a corporation,

Defendant-Appellee.

Appeal from the

Circuit Court,

Stephenson County.

26 I.A. 254

McNEAL, P.J. --

The Circuit Court of Stephenson County sustained a motion of the defendant, Bee Line Service, Inc., to dismiss plaintiff's complaint. Plaintiff elected to stand by her complaint and appealed from a final judgment in bar of her action.

In substance plaintiff alleged: that defendant owned and operated a gasoline filling and bulk station with an underground gasoline storage tank a short distance from its office building, in Freeport, Illinois; that defendant by its agents, servants and officers knew that if its tank was not properly vented, gasoline fumes would accumulate in and around its office, and in accordance with such knowledge, defendant installed a vent pipe extending about 14 feet above the pavement over the tank to carry off such fumes; that with knowledge of the dangers of the fumes, defendant by its agents, servants and officers disconnected the vent pipe a few inches above the pavement and substituted no other vent pipe to carry the fumes away; that on September 3, 1954, about 4:30 P.M., the plaintiff, a minor of the age of seven years, daughter of one of the officers of the defendant company, came into defendant's office and while she was there and in the exercise of due care, the defendant company by and through its agents, servants

and officers, "carelessly, recklessly and negligently" transported, kept and stored gasoline in its tank so as to jeopardize person's lawfully on its premises, permitted the vent pipe to be removed, permitted the fumes to escape from the tank and to spread around its premises and to ignite and explode, and failed to properly store the gasoline, all in violation of paragraph 351, Ch. 38, Ill. Rev. Stat. 1955; and that as a proximate result the fumes ignited and exploded and severely burned, scarred and permanently injured plaintiff, to her damage in the sum of \$50,000..

The grounds specified in defendant's motion to dismiss made under section 48 of the Civil Practice Act, were that it appears from plaintiff's complaint, bill of particulars, and answers to defendant's interrogatories: (1) that the negligent acts alleged were committed by one or both of the parents of the minor plaintiff, a parent is not liable to a minor child for negligence, and under the doctrine of respondeat superior, a principal may not be held liable where the agent is not liable to the plaintiff; and (2) that plaintiff was on the premises as a guest, and therefore cannot recover for negligence.

From plaintiff's bill of particulars and answers to defendant's interrogatories, it appears that the agents, servants and officers referred to in the complaint were Stanley C. Bauch and Irene Bauch; that the minor plaintiff is a daughter of said officers of the corporation; that the vent pipe was installed by Stanley Bauch in 1954 when the underground tanks were installed; that he disconnected the vent pipe; and that plaintiff came into defendant's office "for no particular purpose."

Plaintiff states that this action was brought to recover damages occasioned by the alleged "negligence" of the defendant, and her theory on appeal is that her complaint states a good cause of action. Defendant's theory is that plaintiff was a guest on defendant's premises and cannot recover for ordinary negligence.

In Krantz v. Nichols, 11 Ill. App. 2d 37, 41, the court said:

"We find that the law is well settled that a social guest is treated as a licensee and not an invitee and therefore must prove wilful and wanton misconduct in order to recover against the possessor of the land. Ellguth v. Blackstone Hotel, 408 Ill. 343, 347; 97 N.E. 2d 290; Biggs v. Bear, 320 Ill. App. 597, 51 N.E. 2d 799. * * * We have held that, in the absence of a showing of an attractive nuisance, the rule is applicable to children. Jones v. Schmidt, 349 Ill. App. 336, 110 N.E. 2d 688."

Under the allegations appearing on the face of plaintiff's complaint and facts presented by her bill of particulars and her answers to defendant's interrogatories, we conclude that plaintiff's status in the legal sense was that of a licensee rather than an invitee and she was required to allege that her injuries were proximately caused by defendant's wilful and wanton misconduct. Since plaintiff elected to stand by her complaint, the trial court properly entered final judgment in favor of defendant. The judgment of the Circuit Court of Stephenson County is affirmed.

Affirmed.

DOVE and SPIVEY, JJ., concur.



IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT, FIRST DIVISION
OCTOBER TERM, A.D. 1959

GEORGE HILLER,

Plaintiff-Appellee,

vs.

JOHN F. CASEY and GERTRUDE B. CASEY,

Defendants-Appellants.

Appeal from the

Circuit Court,

McHenry County.

261A. 261

McNEAL, P.J. --

This is an appeal from a decree of the Circuit Court of McHenry County foreclosing a mechanic's lien in favor of George Hiller and against John F. Casey and Gertrude B. Casey. In his complaint filed on July 22, 1957, Hiller alleged that on September 15, 1955, the parties made an oral agreement by which he was to erect a fifteen by forty foot addition to Casey's residence. Plaintiff alleged that he completed the addition under defendants' direction and supervision at a cost of \$5611.12, and that \$2000 had been paid, leaving a balance of \$3611.12 due. Plaintiff prayed for an accounting and for a mechanic's lien upon defendants' property for the amount including interest as found to be due. By his claim for lien filed on September 7, 1956, plaintiff claimed a lien on the basis of time and material furnished, for a balance of \$3611.61.

In their answer defendants admitted an oral agreement with plaintiff for the erection of the addition, but denied that the work was done at a cost of \$5611.12. They alleged that the hourly wage charged for workmen was excessive and greater than that agreed upon; that hours charged for labor were not spent in construction; that materials were diverted to other uses; and that the last delivery of

material and performance of labor was in November, 1955, and not in May, 1956. Defendants counterclaimed that plaintiff's performance was unskillful and careless, to their damage amounting to \$2000. Plaintiff denied the allegations in the counterclaim.

The cause was referred to a master in chancery, who found that plaintiff had furnished the labor and material necessary for the construction of the addition, and had been paid \$2000; and that defendants still owed \$3610.80, and interest thereon at 5% from January 1, 1956, less \$41.50 for a soffit installed by defendants. Objections and exceptions to the master's report were overruled. The report was approved and confirmed, and a decree of foreclosure entered. Defendants appealed.

Their theory on appeal is that the master's report and the decree are contrary to the manifest weight of the evidence and beyond the scope of plaintiff's pleading and proof. More particularly, they complain of (1) the variance between the amount stated in plaintiff's claim for lien and the amount alleged in his complaint; (2) the allowance of interest; (3) the failure to consider as admitted affirmative matters in defendants' answer not denied; and (4) the master's failure to find that the evidence preponderated in defendants' favor.

The record discloses a variance between the amount set forth in plaintiff's claim for lien and that alleged in his complaint. His claim for a lien which reflected a total cost of \$5060.61 and payment of \$2000 on account, was admitted in evidence without objection. Several other exhibits which were also admitted in evidence without objection, show that Hiller expended a total of \$5610.80, including: \$2374.09 for materials from Alexander Lumber Company, \$2626.25 for workmen's wages, \$323.25 for concrete, \$12.90 for building permit, and divers other amounts for brick, flashing, gravel, sand, etc. In their brief defendants say that plaintiff's exhibits were self-serving,

secondary and inadmissible documents. According to their abstract, however, the only exhibit objected to by defendants was a plan for construction of a fourteen by forty foot addition which Hiller submitted to the building inspector. This exhibit was admitted for the limited purpose of showing the dimensions and pitch of the roof of the addition as built by plaintiff. Further, defendants' objections and exceptions to the master's report were that the findings were contrary to equity, law and the manifest weight of the evidence, the work was not in fact completed, the finding that the contract was executed in a good and workmanlike manner was contrary to the evidence, and the master erred in finding that plaintiff was entitled to \$3610.80, with interest. It should be noted that the objections and exceptions contain no reference to improper admission of evidence or variance. To take advantage on review of alleged errors in the admission of evidence before a master, it is necessary to object before the master by including the objection in the objections filed in the master's report, and to renew it before the court as an exception to the master's report. *Peck v. Peck*, 16 Ill. 2d 268, 278, 157 N.E. 2d 249, 256. The question of the master's admission of evidence at variance with plaintiff's allegations or claim for lien was never brought to the chancellor's attention or passed upon by him, and is not properly before us for review. Having permitted evidence to be admitted without objection upon which the master could and did determine that \$3610.80 was due plaintiff, defendants cannot raise the question of variance for the first time on appeal.

Defendants contend that no time for payment was fixed and that interest should have been allowed only from the date of the decree, and not before. Plaintiff's statement dated January 1, 1956, which was admitted in evidence without objection, shows a total of \$5610.80 due him, and payments aggregating \$1500.00. It was not disputed that defendants' payments on account were as follows: November 20, 1955, \$1000.00; December 5, 1955, \$500.00; and April 13, 1956, \$500.00.

Plaintiff was under the impression that he mailed his statement to defendants on the date it bears. Mrs. Casey claimed that she received the bill a week or two after September 7, 1956, and also that she did not receive it until in December, 1956. However, the payments totaling \$1500 credited on the statement tended to show that the bill was rendered between December 5, 1955, and April 13, 1956, and defendants' payment of \$500 on the account on the latter date was some evidence of their acquiescence in the correctness of the amount stated. On this evidence the master concluded that plaintiff was entitled to interest on the balance of \$3610.80 due, at the rate of five per cent per annum from January 1, 1956. The chancellor approved the master's conclusion with regard to interest, and ordered defendants to pay \$490.80 for interest on the balance due at that rate from January 1, 1956, until September 1, 1958, the date of the master's report, and thereafter at the same rate until defendants' premises were sold. Although plaintiff did not specify the period or rate of interest claimed, it is apparent from his complaint that he sought interest on such amount as might be found to be due to him. In our opinion the trial court did not err in allowing interest on the amount found to be due plaintiff from the date the money was due and payable. *Edward Edinger Co. v. Willis*, 260 Ill. App. 106, 128; *Hoffman v. Lake View Avenue Corp.*, 293 Ill. App. 267, 12 N.E. 2d 340; *Chicago Art Marble Co. v. A. Smith & Co.*, 304 Ill. App. 582, 26 N.E. 2d 703.

Defendants insist that by his failure to reply to and deny the affirmative matters alleged in their answer, plaintiff must be deemed to have admitted that the hourly wages charged were excessive, that materials were diverted to other uses, etc. However, the record shows that defendants failed to take any steps to preserve this point in the trial court, and introduced evidence on all the material issues in the cause. Under such circumstances, it has been held that the failure to reply is waived, and the rule that such allegations are admitted does not apply. *Cienki v. Rusnak*, 398 Ill. 77, 88; *Sottiaux*

v. Bean, 408 Ill. 25, 28.

Mrs. Casey testified that she had two conversations with plaintiff concerning the addition to her home prior to commencement of construction. She thought she wanted a 40 by 15 foot addition to consist of three rooms, a large bedroom, an extension of the existing diningroom, and a kitchen. She showed him a rough sketch of a plan and gave him the measurements of the rooms. She asked plaintiff to get the material at the Alexander Lumber Company and charge it to her name and to submit weekly statements of the hours his men worked on the addition. She wanted a "hip" roof, but he said that that type of roof would run into quite a bit of lumber. He told her that he and James Stilling were to be paid \$3.00 an hour and the other men \$2.00 an hour. She engaged another carpenter to complete a soffit and paid \$41.50 for this work.

Plaintiff disclaimed any agreement with reference to the interior finish, plumbing, wiring, floor finish, the number of workmen or their rate of pay, and the method of obtaining and paying for the materials. Most of the details were resolved as the work progressed. Plaintiff's foreman, James Stilling, corroborated plaintiff's testimony with respect to discussions with Mrs. Casey concerning the type of roof to be built and the conclusion that a deck roof was the only type of roof which could be erected on the low side of the existing roof without rebuilding the roof of the house to which the addition was attached. Plaintiff's foreman testified that Mrs. Casey never disapproved of any aspect of the work done.

Appellants suggest that Mrs. Casey's testimony that she had arranged to pay the lumber bills directly to the Alexander Lumber Company and pay the labor based on time cards to be submitted weekly is "more credible" than plaintiff's testimony; and that their testimony that plaintiff's statement was transmitted to them in December, 1956, is "more believable and probable" than plaintiff's impression that the statement was rendered on January 1, 1956, the date it bears. These

suggestions are typical of defendants' position on this appeal and reveal a misapprehension of the function of this court on review. The trial court determines the credibility of the witnesses and the weight of their testimony. Where, as here, the findings of the master have been approved by the chancellor, the rule which binds an appellate court on a review of such findings is that they must be sustained unless against the manifest weight of the evidence. It has been said that this statement of the law appears in almost every volume of the Supreme and Appellate Court reports.. It is within this limitation that we must consider the factual issues in this case. *Oppenheimer Bros., Inc. v. Joyce & Co.*, 20 Ill. App. 2d 34, 38, 154 N.E. 2d 856, 859. The rule is well established that a master's findings of fact, when approved by the chancellor, as here, will not be disturbed unless they are manifestly against the weight of the evidence. *Schmitt v. Heinz*, 5 Ill. 2d 372, 381.

After a careful examination of the evidence as abstracted, we are of the opinion that the master and chancellor properly found that defendants orally engaged plaintiff to build an addition to their home and that he furnished the material and performed the services necessary to erect the addition substantially as directed by defendants. We cannot say that the findings of the master and chancellor and their conclusions with respect to the amount due plaintiff are manifestly against the weight of the evidence. Accordingly, the decree of the Circuit Court of McHenry County is affirmed.

Affirmed.

DOVE, J., concurs.

SMITH, J. Took no part

FILED JUNE 20, 1960

NO. 11253

Abstract only

Agenda 15

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT, FIRST DIVISION
FEBRUARY TERM, A.D. 1959

LORINE GRANTHAM,

Plaintiff-Appellant,

vs.

JACK BURTON YORK,

Defendant-Appellee.

Appeal from the

Circuit Court,

Kane County.

26 LA 278

McNEAL, P.J. --

This action was brought by Lorine Grantham to recover damages for personal injuries occasioned by the defendant's negligence in the operation of his automobile. A jury returned a verdict in her favor for \$750. Judgment was entered on the verdict. Plaintiff's post-trial motion was denied and she appealed. Appellant contends that the amount of damages awarded by the jury was wholly inadequate and that the court erred in giving instruction 23 offered by defendant.

About 4:00 P.M. on Saturday, April 13, 1957, plaintiff was riding in the front seat of an automobile operated by her husband. He drove the auto south on Broadway and stopped in a line of traffic at the traffic light at the Main Street intersection in Aurora. Defendant's car was second to the rear of the Grantham auto and in the same line of traffic. Defendant was intoxicated. When the light changed, the vehicle in front of defendant pulled out around the Grantham auto, and defendant drove his car into the rear of the Grantham auto.

Immediately after the impact her husband asked plaintiff if she was all right and she replied that she thought she was okay. Then a police officer asked if she was hurt and she replied that she wasn't

sure, but she didn't want to go to the hospital. He testified that there were no physical marks of any injuries and that no one required medical attention.

After the accident the Granthams proceeded in their automobile to their home. Plaintiff testified that she lay down a couple of seconds and her head and neck hurt so bad that she went to the hospital and some X-rays were taken. She immediately returned to her home and spent Sunday there, but on Monday morning she went to work as usual, worked a couple of hours, and then went home. Mrs. Grantham was in the hospital for five days. She testified that she slept in traction with a cervical collar for about six weeks after leaving the hospital, and that she "went back to work around June 24 or 20, something like that", and worked regularly thereafter as an employee of Western Electric. Her weekly pay "was around \$80.00 per week" and she received piece work compensation that "ran \$30.00 to \$50.00 additional per month."

Mrs. Grantham testified that a month before the trial she got worse and went to Dr. Lithgow who charged her \$10.00 but she received no benefit from him. At the time of the trial she cried, and testified that she didn't feel well, but was "hurting so bad" in her neck and back, and that she was "upset and nervous". Dr. Anderson testified that the tenderness and stiffness in plaintiff's neck gradually receded after she was in traction a few days and that he saw her on an average of once a week after her return home from the hospital.

The cervical collar and a couple of dozen bills or statements were exhibited to the jury. These statements show that plaintiff paid or became liable for the following: Dr. Anderson, \$201.00, hospital \$103.30, Dr. Lithgow \$10.00, cervical brace \$41.20, head halter \$11.20, traction rental \$9.00, medicine \$21.91, and X-rays \$32.00. These items aggregate \$429.61. Thus, the jury allowed her \$320.39 for her loss of wages which amount to about 4 weeks at \$80.00 per week, instead of the 10 or 11 weeks she claims she lost.

At plaintiff's request the jurors were instructed that they were the judges of the credibility of the witnesses, that they had the right to consider all of the evidence in the light of their own observations and experiences in the affairs of life, and that it was their right and duty to determine all questions of fact from the evidence. Plaintiff's instruction 12 told the jury that in determining the amount of her damages they should take into consideration (a) the nature and extent of her physical injuries, (b) her suffering in mind and body, (c) her future suffering and loss of health, (d) her past and future loss of time and her inability to work, (e) all moneys necessarily expended and bills which she necessarily became liable to pay in being treated for her injuries. This instruction concluded "and you may find for the plaintiff in such sum as will be fair compensation with respect to the foregoing elements as have been proven by the greater weight of the evidence."

At the conference on instructions counsel for plaintiff objected to instruction 23 tendered by defendant and particularly to the use of the word "injuries" in that instruction. By this instruction the jurors were told that they should award plaintiff only such damages as will compensate her for "the injuries she has suffered" and that plaintiff has the burden "to prove each element of damage claimed by her by the greater weight of the evidence." The jurors could not have been misled by this instruction into limiting plaintiff's damages to her "injuries", because they were told to consider the instructions as a series, and by plaintiff's instruction 12 that they might consider plaintiff's expenses and loss of earnings, as well as every element of damages applicable in her case, and because her 12th instruction uses the same word "injuries". There is no merit in plaintiff's objection.

The jury probably concluded that the plaintiff was able to return to work after an absence of 4 weeks. They saw her in court and on the witness stand and they heard her testimony and that of her

husband, the police officer and the doctor, and they had before them the exhibits and were fairly and adequately instructed by the court as to the applicable law. It is apparent that the jurors had some basis for concluding that all of the damages claimed by plaintiff were not the proximate result of the collision. The reasonableness and necessity of the expenses incurred, and the impairment of plaintiff's earning capacity, if any, were all questions for the jury (15 ILP 613, Damages Par. 261), and the amount of damages was primarily a question of fact for the jury to determine. *Hulke v. International Mfg. Co.*, 14 Ill. App. 2d 5, 49. Where, as here, the size of the verdict does not clearly indicate that it was the result of prejudice or passion on the part of the jury, the award should not be disturbed on review. *Kaptain v. Overgaard*, 19 Ill. App. 2d 483, 154 NE 2d 105; *Starac v. Corsale*, 22 Ill. App. 2d 142, 159 NE 2d 384.

There is no error in the record justifying a reversal of the judgment of the Circuit Court of Kane County, and the judgment is therefore affirmed.

Affirmed.

DOVE, J., concurs.

SMITH, J. Took no part.

AEEST.



47992

WILLIAM H. COLEMAN and WILMA R.
COLEMAN, his wife,

Appellants,

v.

JAY GORAN and W. F. SMITH,

Appellees.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

261A^{2d} 288

MR. PRESIDING JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

Plaintiffs appeal from an order striking and dismissing their amended complaint in chancery, in which they charge fraud and deceit and seek rescission of articles of agreement for warranty deed and an accounting.

In response to a newspaper advertisement, plaintiff Wilma R. Coleman called at the real estate office of defendant W. F. Smith on August 28, 1956, and a salesman showed her premises for sale at 410 West 62nd Street, Chicago, Illinois. On September 4, 1956, plaintiffs, as purchasers, executed conventional articles of agreement for a warranty deed for the premises. The contract seller was defendant Jay Goran, as trustee. The price was \$11,900, with \$375 as an initial payment, and monthly payments of \$100, which were to be applied, first, to interest at 6% per annum, payable monthly on the whole sum remaining from time to time unpaid, and the remainder to principal.

Plaintiffs entered possession on October 20, 1956. On May 4, 1957, after discovering "the premises were in deteriorating condition," and as "they were subject to harassment by authorities

of the Building Department of the City of Chicago," and "were ordered to expend large sums of money for the purpose of maintaining premises," plaintiffs called upon defendant Smith and "demanded that repairs be made by him." Smith told them to make the complaint "where you pay your money." From May 5, 1957, to October 15, 1958, plaintiffs made repeated and unsuccessful attempts to communicate with defendant Goran, and on or about October 15, 1958, "plaintiffs tendered possession of premises back to the defendant." On December 16, 1958, plaintiffs commenced the present action based on fraud and deceit in the sale.

Defendants' motion to strike and dismiss the amended complaint, with a supporting affidavit, was filed pursuant to sections 45 and 48 of the Civil Practice Act. No counter-affidavit was filed. After a hearing, and consideration of the supporting affidavit, the court found that plaintiffs' amended complaint failed to state a cause of action, and that plaintiffs were "guilty of having failed to disaffirm their contract at the earliest practicable moment after discovering the alleged fraud attempted to be pleaded." As plaintiffs elected to stand on their amended complaint, the court struck it and dismissed the action.

The only question presented by this appeal is whether the amended complaint states a cause of action, based on fraudulent misrepresentations of defendants, which would justify the rescission of the contract.

The amended complaint must show that the defendants made false representations as to material matters, knowing them to be false, with the intent to deceive the plaintiffs, and that the plaintiffs believed such representations, reasonably relied upon them and acted thereon to their injury. 19 I.L.P. 555, Fraud, §3; Bouxsein v. First National Bank of Granville, 292 Ill. 500, 502 (1920).

It is essential that the facts and circumstances which constitute the alleged fraud and deceit should be set out clearly, concisely and with sufficient particularity to apprise defendants of what they are called upon to answer. (Aaron v. Dausch, 313 Ill. App. 524, 533 (1942).) If the complaint states only conclusions of the pleader, and not facts, it is wholly insufficient to charge fraud. Knaus v. Chicago Title & Trust Co., 365 Ill. 588, 593 (1937).

A motion to dismiss does not admit conclusions or inferences drawn by the pleader, such as conclusions of law or of fact, unsupported by allegations of specific facts on which the conclusions must rest. (Gasquoine v. Bornstein, 10 Ill. App. 2d 423, 427 (1956).) Where a motion to dismiss is made under section 48 of the Civil Practice Act, the court may consider the supporting affidavit in addition to the allegations of the pleadings, and where no counter-affidavits are filed, the facts alleged in the affidavit in support of the motion must be accepted as true as far as material. 30 I.L.P. 136 Pleading, §193.

The representations which plaintiffs allege were false consist of statements made to them by Smith, as to value and as to the physical condition of the building, and which they allege were made as part of a scheme of Smith and Goran to overreach and defraud plaintiffs. Smith told the plaintiffs that the property was worth \$12,000, and that they could rely on his professional opinion as a real estate broker. He also told them they needed no independent counsel, as his office would provide all legal services. He stated that the building was in "very good shape" and required just a little repair work "here and there." Plaintiffs allege their reliance on these statements, together with the superior knowledge of Smith and Goran, made Smith their agent, and established "a confidential and fiduciary relationship" between plaintiffs and Smith, which Smith betrayed by concealing from plaintiffs the true value of the property, which Smith knew to be less than \$3,000.

Statements as to the value of property are ordinarily considered mere expressions of opinion and, for that reason, are not sufficient to warrant a rescission of the contract, even though they are false and relied upon by the other party. The rule is otherwise where the misrepresentation relates a specific, extrinsic fact, peculiarly within the knowledge of the party making the statement, which materially affects the value.

(Pustelniak v. Villimas, 352 Ill. 270 (1933).) Plaintiffs do not allege any specific facts materially affecting the value of

the property, which were peculiarly within the knowledge of Smith or Goran. They rely on the allegation that they were without knowledge of real estate values and Smith was their agent and fiduciary, and betrayed their confidence.

Reliance on Smith's professional opinion or superior knowledge as a real estate broker was not sufficient to create an agency within any of the accepted definitions. Apparently they were strangers, without any previous transactions between them. Smith was not employed by the plaintiffs to transact any business for them or to manage their affairs. Smith's statement that plaintiffs needed no independent counsel, and that his office would provide all legal services, might be construed to bind him to provide competent counsel for the routine legal services incident to the purchase of a parcel of real estate. However, they do not complain of any misconduct in this area. Legal services do not include appraisals of real estate. A mere assertion of faith and trust in Smith, because of his "superior knowledge" and professional opinion, is insufficient to create a fiduciary relationship, and we conclude that the allegation of the existence of a fiduciary relationship with Smith is not supported by facts justifying such a conclusion. Aaron v. Dausch, 313 Ill. App. 525, 534.

As to the physical condition of the building, plaintiffs allege they took possession on October 20, 1956, and on May 1, 1957, discovered the premises were in a "deteriorating condition" and were ordered by the Building Department of the

City of Chicago to expend large sums of money for the purpose of maintaining the premises. An allegation is made as to the installation of a "side vestibule, four new windows, jalousie windows, two doors, new concrete steps, front and side and railings, fence for the entire lot and other repairs to the approximate value of \$4,000." There is no allegation that these improvements were ordered by the Building Department, nor that they were made to correct conditions which were concealed from them on or before September 4, 1956. As has been said a number of times, a party in possession of his mental faculties is not justified in relying on representations made, when he has ample opportunity to ascertain the truth of the representations before he acts. If the purchaser has an opportunity to view the property, it is his duty to make use of that opportunity. Unless the representations concern matters which the prospective purchaser cannot readily determine upon examination, he will be held to have exercised his own judgment rather than to have relied on the statements of the seller. (Malnick v. Rosenthal, 313 Ill. App. 249, 255 (1942).) If one does not avail himself of the means of knowledge open to him, he cannot be heard to say he was deceived by misrepresentations. Bundesen v. Lewis, 368 Ill. 623 (1938).

The supporting affidavit filed with defendants' motion to dismiss shows that both plaintiffs resided in Chicago for more than thirty-seven years, and each attended public high school for at least two years. If we accept the allegation

-7-

that Smith misrepresented the value and condition of the property, there is nothing to show that they were hurried into the deal or that they did not have an ample opportunity to ascertain the value and condition of the premises before they acted. A misrepresentation with respect to value or condition is not sufficient to constitute fraud and deceit, where the purchaser has a full opportunity to inspect the property to be purchased and to ascertain for himself the fair market value of the property and its condition. Bouxsein v. First National Bank of Granville, 292 Ill. 500, 504.

We believe plaintiffs have failed to allege sufficient facts to show actionable fraud and deceit upon the representations made as to the value or physical condition of the premises.

We do not believe the instant situation lends itself to any practical discussion by this court on the argument presented by plaintiffs as to unfair practices by speculators in transitional communities, or as to the "evils" of the use of articles of agreement for warranty deed, which plaintiffs term a "fraudulent device."

For the reasons stated, the order of the trial court is affirmed.

AFFIRMED.

KILEY AND BURMAN, JJ. CONCUR.

ABSTRACT ONLY.

ABST.



47966

JEWEL TEA CO., INC., a New York
corporation,

Appellant,

v.

CHICAGO TRANSIT AUTHORITY, a
Municipal corporation, and BONGI
BROS., INC.,

Appellees.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

261A^{2d}289

MR. PRESIDING JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

Plaintiff, an unsuccessful bidder for the purchase of real estate being sold by the defendant Chicago Transit Authority, sued for a declaratory judgment that it was entitled to be awarded the contract of sale and for a determination that the award to the defendant Bongi Bros., Inc., was null and void. Plaintiff also sought an injunction restraining the defendants from any activity connected with the award to Bongi Bros. The court entered a summary judgment in favor of defendants, and plaintiff appeals.

The case was determined by the court on the pleadings, which consist of the complaint as amended, motions of both defendants for summary judgment, and motion of plaintiff to strike both motions for summary judgment.

The CTA, desirous of selling real estate known as 1133-1159 North Western Avenue and 2301-2357 West Division Street, Chicago, Illinois, advertised for bids in conformance with the provisions of section 32 of the Metropolitan Transit Authority

Act (Ill. Rev. Stat. 1957, Ch. 111-2/3, §332). Of six bids submitted, the highest bid was \$320,000, made by Bong1 Bros., Inc., an Illinois corporation. The next highest bid of \$275,125 was made by Clarence Lieder. The third highest bid of \$263,050 was made by plaintiff. As required by section 32, the bids were accompanied by noncollusion affidavits on printed forms, supplied by the CTA and completed by the bidders. Upon the opening of the bids on February 18, 1959, the secretary of the defendant corporation questioned the acceptance of the Bong1 bid and stated that its noncollusion affidavit did not comply with section 32. Several weeks later, and after study, the defendant corporation awarded the contract of purchase to Bong1.

Plaintiff alleges that the noncollusion affidavit which accompanied the Bong1 bid was not signed by the person purporting to make it and wholly failed to comply with section 32, and that Clarence Lieder failed to comply with the requirements for bidding, since the amount of the certified check accompanying his bid was less than 10% of the amount of the bid. Plaintiff prays that the court make a binding declaration concerning the rights and obligations of the parties, and determine that plaintiff was entitled to be awarded the contract of sale as the highest responsible bidder, that the award of the contract to Bong1 Bros. is null and void, and that the bids of Bong1 Bros. and Clarence Lieder are not proper bids and are not entitled to be considered in connection with the awarding of the contract.

Section 32 of the Metropolitan Transit Authority Act includes the following sentence: "Each bidder shall accompany his bid with a sworn statement that he has not been a party to any such [collusive] agreement."

The Bongi affidavit is as follows:

NON-COLLUSION AFFIDAVIT

To be executed and filed with the proposal under the Metropolitan Transit Authority Act

IMPORTANT: In submitting and as a part of this proposal, the bidder shall execute this Non-Collusion Affidavit

STATE OF Illinois)
COUNTY OF Cook) SS.

Vincent P. Bongiovanni, being first duly sworn, deposes and says that he is Secretary (insert "sole owner", "a partner", "president", "secretary", or other proper title)

of Bongi Bros., Inc.
the bidder submitting this proposal; that such bid was not made in the interest of or on behalf of any undisclosed person, partnership, company, organization or corporation; that such bid is genuine and not collusive or sham, and that said bidder has not directly or indirectly, by agreement, communication or conference with anyone attempted to induce action prejudicial to the interests of the public body which is to award the contract, or any bidder or anyone else interested in the proposed contract.

Signed: Bongi Bros., Inc.

By Vincent P. Bongiovanni

Subscribed and sworn to before me this
18th day of February, 1959.

Norma Bongiovanni
Notary Public

(Seal of Notary)

The principal question for determination in this appeal is whether the Bongi noncollusion affidavit meets the requirements of section 32, as plaintiff does not contend there was any collusion in the bidding.

We have carefully examined the contentions of plaintiff and the authorities cited in support thereof and have come to the conclusion that the opinion and judgment of this court in Lieder v. Chicago Transit Authority, No. 47923, which is an appeal of another unsuccessful bidder for the same premises, is determinative of the instant appeal. We there decided that the noncollusion affidavit which accompanied the Bongi bid was sufficient to satisfy the requirements and intent of section 32.

In view of the conclusion reached, it is unnecessary to discuss the points raised in this appeal. The judgment is, therefore, affirmed.

AFFIRMED.

KILEY AND BURMAN, JJ., CONCUR.

ABSTRACT ONLY.

ABST.



47968

LORETTA KING,

Plaintiff-Appellant,

v.

CORNELIUS MUSCH d/b/a C. MUSCH
CONSTRUCTION CO.,

Defendant-Appellee.

APPEAL FROM

COUNTY COURT

OF COOK COUNTY

261A-290^{2d}

MR. JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

Loretta King seeks to recover damages claiming that the construction of driveways, sidewalks, breezeways and back-stoops at her residence by Musch Construction Co. was improperly done and not completed. She sues for \$2,000.00. Defendant's motion to dismiss was sustained. Plaintiff appeals. Defendant has filed no briefs.

Musch moved to dismiss under Sec. 48(1)(d) under the Civil Practice Act and in his supporting affidavit states that King filed an answer and counterclaim in a previous action for money due under a contract to construct certain concrete sidewalks and driveways at King's residence and alleged the same facts in this suit.

The record indicates that King in her answer to the previous suit denied there was due any money to Musch and in Count II stated that she will be required ... to remove the defective concrete ... to defendant's damages of \$2,000.00.

In his reply, Musch denied King was damaged in the amount of \$2,000.00, or in any sum whatsoever. A default judgment was entered against King for \$267.50. A petition to vacate filed by her was denied.

Plaintiff contends that the trial court should have overruled the motion to dismiss on the theory that there is no valid prior judgment to bar this action. He bases this argument on the additional finding in the previous case that "judgment is entered for plaintiff on defendant's counterclaim", and points out that the affirmative defense is not a counterclaim and refers us to the Civil Practice Act, Sec. 38, Parts 1, 2 and 3, which provide:

"(1) Subject to rules, any demand by one or more defendants against one or more plaintiffs, or against one or more co-defendants, whether in the nature of a setoff, recoupment, crossbill in equity, cross demand or otherwise, and whether in tort or contract, for liquidated or unliquidated damages, or for other relief, may be pleaded as a cross demand in any action, and when so pleaded shall be called a counterclaim.

(2) The counterclaim shall be a part of the answer, and shall be designated as a counterclaim. Service of process on parties already before the court is not necessary.

(3) Every counterclaim shall be pleaded in the same manner and with the same particularity as a complaint, and shall be complete in itself, but allegations set forth in other parts of the answer may be incorporated by specific reference instead of being repeated."

This part of the judgment order is in our opinion superfluous and does not void the judgment. The order also recited "that after hearing plaintiff's evidence ... judgment is entered for plaintiff in the amount of \$267.50 and costs."

Plaintiff had an opportunity to offer evidence in the former suit and if her evidence was sufficient the suit would have been dismissed. Having failed to do so she cannot now file a new action to litigate what could have been tried and determined in the former suit. See *Kirkham v. Harris*, 285 Ill. App. 385. Nor does the fact that the judgment is based upon a default, alter the rule. Judgments by default have the same validity and force as those rendered upon a trial of the issues. *Dyer v. Hopkins*, 112 Ill. 168; *Walden National Bank v. Birch*, 130 N.Y. 221.

Negligent and improper workmanship, presented as a defense in both the answer and the petition, is the basis of plaintiff's complaint in the instant action. After a careful analysis of the record we are convinced that everything presented by the plaintiff in the instant case has been previously considered by the trial court in the answer and petition to vacate filed in the prior action.

Since the same parties and the same subject matter were involved in the previous action, that action acts as a bar to recovery in the instant case under the well established principles of res judicata. In *re Simaner*, 15 Ill. 2d 568; *Hicks v. Hicks*, 20 Ill. App. 2d 139. For this reason we deem it unnecessary to consider any other points raised. In our opinion, the trial court correctly dismissed the suit and accordingly the judgment is affirmed.

AFFIRMED.

MURPHY, P.J. AND KILEY, J. CONCUR.

ABSTRACT ONLY





47923

CLARENCE LIEDER.

Appellant,

v.

CHICAGO TRANSIT AUTHORITY.

Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

26 TA^{2d} 806

MR. PRESIDING JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

Plaintiff, an unsuccessful bidder for the purchase of real estate being sold by defendant, the Chicago Transit Authority, sued to set aside the award of the contract of sale to the highest and successful bidder. The court entered a summary judgment in favor of defendant, and plaintiff appeals.

The case was determined by the trial court on the pleadings, which consist of the complaint, defendant's motion for summary judgment and supporting affidavit, and plaintiff's answer thereto.

The CTA, desirous of selling real estate known as 1133-1159 North Western Avenue and 2301-2357 West Division Street, Chicago, Illinois, advertised for bids in conformance with the provisions of section 32 of the Metropolitan Transit Authority Act (Ill. Rev. Stat. 1957, Ch. 111-2/3, §332). Of six bids submitted, the highest bid was \$320,000, made by Bongl Bros., Inc., an Illinois corporation. The next highest bid of \$275,125 was made by plaintiff. As required by section 32, both bids were accompanied by noncollusion affidavits on printed forms, supplied by the CTA and completed by the bidders. Upon

the opening of the bids on February 18, 1959, the secretary of the defendant corporation questioned the acceptance of the Bong1 bid and stated that its noncollusion affidavit did not comply with section 32. Several weeks later, and after study, defendant awarded the contract of purchase to Bong1.

Plaintiff alleges that the noncollusion affidavit which accompanied the Bong1 bid was defectively executed, in that it did not comply with the wording or intent of section 32, and was a nullity. He prays that the contract for the purchase of the property be awarded to him, the next highest bidder, or that all bids submitted should be held for nought and a re-advertisement for the sale of the property be ordered.

Section 32 of the Metropolitan Transit Authority Act includes the following sentence: "Each bidder shall accompany his bid with a sworn statement that he has not been a party to any such [collusive] agreement."

The Bong1 affidavit is as follows:

NON-COLLUSION AFFIDAVIT

To be executed and filed with the proposal under the Metropolitan Transit Authority Act

IMPORTANT: In submitting and as a part of this proposal, the bidder shall execute this Non-Collusion Affidavit

STATE OF Illinois)
COUNTY OF Cook) SS.

Vincent P. Bongiovanni being first
duly sworn, deposes and says that he is Secretary
(insert "sole owner", "a partner", "president", "secretary",
or other proper title)
of Bongi Bros., Inc.
the bidder submitting this proposal; that such bid was not
made in the interest of or on behalf of any undisclosed person,
partnership, company, organization or corporation; that such bid
is genuine and not collusive or sham, and that said bidder has
not directly or indirectly, by agreement, communication or
conference with anyone attempted to induce action prejudicial
to the interests of the public body which is to award the
contract, or any bidder or anyone else interested in the
proposed contract.

Signed: Bongi Bros., Inc.

By Vincent P. Bongiovanni

Subscribed and sworn to before me this
18th day of February, 1959.

Norma Bongiovanni
Notary Public

(Seal of Notary)

The sole question for determination in this appeal is
whether the Bongi noncollusion affidavit meets the requirements
of section 32, as plaintiff does not contend there was any
collusion in the bidding.

Section 32 prescribes no form for the "sworn statement,"
such as is set forth in section 157.151 of the Corporations Act
(Ill. Rev. Stat. 1957, Ch. 32), and no authority is cited by
plaintiff to support his contention that the noncollusion affi-
davit must be substantially within the form set forth in section
157.151. We see no merit in this contention.

Plaintiff's principal contention is that the purported affidavit is signed merely by the corporation, an artificial person, and binds no one individual to any statement made in its body or context; that the purpose of the noncollusion affidavit is to make the individual executing the affidavit amenable to the criminal laws of the State of Illinois pertaining to perjury (Ill. Rev. Stat. 1957, Ch. 38, §473); and that a corporation cannot be indicted for perjury. People v. Duncan, 363 Ill. 495; People v. Strong, 363 Ill. 602.

It does not affirmatively appear in section 32 that the "sworn statement" bear the signature of the affiant. The general rule is that, in the absence of a statute or rule of court to the contrary, a signature is not essential where the identity of the affiant, as such, is otherwise sufficiently shown, as where he is named in the jurat, or where the affidavit commences with his name. (2 C.J.S. 956, Affidavits, §(20)(1); 1 Am. Jur. 944, Affidavits, §17.) Illinois seems to follow the majority rule. Glencoe State Bank v. Cole, 265 Ill. App. 158, 164 (1932).

In the instant case, the jurat of the noncollusion affidavit does not contain the name of the affiant, but the document does recite that "Vincent P. Bongiovanni, being first duly sworn, deposes and says that he is Secretary of Bongi Bros., Inc., the bidder submitting this proposal." This is sufficient to show the identity of the affiant, who, as secretary of the bidding corporation, was a proper person to make it on behalf

of the bidder. That he was the person sworn and the person who made the affidavit, and deposed to the facts recited in it, clearly appears from the body of the document, which the notary certifies was subscribed and sworn to. The corporation could not make the affidavit. The statement does bear the signature of Vincent P. Bongiovanni, and the fact that the corporate name is also set forth is not fatal and, in this instance, is surplusage. (2 C.J.S. 956, Affidavits, §20 (c), (e).) The cases cited by plaintiff in which instruments containing signature variances are construed to be corporate documents, on which corporate liability is predicated, are not persuasive to show that the affidavit is not the individual undertaking of Vincent P. Bongiovanni nor binding on him. There is no question but that Vincent P. Bongiovanni in fact made and signed the affidavit.

Swearing to an affidavit without signing is ordinarily sufficient to support a charge of perjury, in the absence of a statute requiring the document to be signed by affiant. (70 C.J.S. 491, Perjury, §24 (d).) The Illinois Perjury statute (Ill. Rev. Stat. 1957, Ch. 38, §473) does not specify that the document bear the affiant's signature in order to support a charge of perjury, and it has been construed to apply to affidavits as well as testimony. (Loraitis v. Kukulka, 1 Ill. 2d 533, 538 (1954).) However, if the object of a signature is to identify the person swearing to the affidavit, in order to make the individual executing the affidavit amenable to the criminal

laws of the State of Illinois pertaining to perjury, we believe the noncollusion affidavit in question meets the test of identity of the person taking the oath as to its contents.

(A.P. Hotaling & Co. v. Brogan, 107 Pac. 711 (1910).) We believe the noncollusion affidavit which accompanied the Bongi bid is sufficient to satisfy the requirements and intent of section 32.

In view of the conclusion reached, it is unnecessary to consider the other points raised in this appeal. The judgment is, therefore, affirmed.

AFFIRMED.

KILEY AND BURMAN, JJ., CONCUR.

ABSTRACT ONLY.

ABST.



47955

CITY OF CHICAGO, a Municipal Corporation,

Plaintiff - Appellee,

v.

IRVIN SHAFFER,

Defendant - Appellant.

) APPEAL FROM

) MUNICIPAL COURT

) OF CHICAGO

261A²¹322

MR. JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

This involves an action brought by the City for the violation of Chapter 38, par. 29 of the Municipal Code of Chicago. The defendant was found guilty and fined \$100.00 and costs. It is from this finding that defendant appeals.

The defendant, Irvin Shaffer, went to the police station, the evening of August 10th, 1959, at 9:00 P.M. to inquire as to the whereabouts of a friend who had been arrested, and was himself arrested for buzzing swimmers at Ardmore Beach. As one of the grounds for reversal, defendant urges that the trial court erred in not sustaining his motion for discharge on the ground that no arrest can be made without a warrant except upon reasonable ground for believing that the person arrested is implicated in a crime. To get a clear understanding of the facts surrounding the arrest and the ruling on the motion to discharge we will examine the evidence leading up to these incidents.

Clarence Becker was the general supervisor of lifeguards from "about Bryn Mawr Avenue north to Pratt Boulevard, including all street-end beaches into the lake." About 6:15 P.M. he saw

defendant's boat come around the pier within 125 feet of the beach, make a U turn and go back. At that time there were 20 to 25 bathers in the area. He testified that "there is a park regulation that all boats cannot be within 300 yards of any designated bathing area or 100 yards to the nearest bather, which is the greatest distance." He asked Shaffer, "Are we going to play games again this year?" And Shaffer replied, "I slowed down when I came in here." Shaffer testified that when he saw Becker he was 25 yards the other side of Becker's rowboat, 100 yards off shore, and Becker said, "Are we going to have a picnic this year as last year?" He also testified that he didn't give Becker the courtesy of an answer, stating, "I had enough goings on last year. I did not want to know the man."

Becker said Shaffer was 60 or 75 yards off the beach when he saw him again; that Shaffer came back a number of times; that on the last occasion he waved him in but Shaffer "put in high and gave him the old wave;" that he then called his superiors who notified the police boat and police squad; and that he talked to Shaffer a number of times in the past three years about the same thing, i.e. "coming too close to shore."

William Wright, a police officer, testified that he was at the beach at 7:30 P.M. in answer to a call his district received that a boat was "buzzing" the beach at Ardmore. He saw Shaffer in a motor launch from which two girls disembarked and waded into shore. At that time, Shaffer was about 75 feet off the water

line. He saw about 20 people in the water and that people were leaving hurriedly. He yelled, "Stop!" several times and Becker hailed the boat but Shaffer moved away at a high rate of speed.

Becker went to the police station about 8:30 that evening. Shaffer came in about 9:00 and asked where his daughter was and if they had any charges against him. While he was there he was arrested by Officers Karras and Gould on the complaint of Becker in violation of 38-29-C.C. The next day he appeared in court with his counsel. The City was granted leave to file instanter its verified complaint signed by Becker charging the defendant with the violation of Chap. 38, par. 29 of the Municipal Code of Chicago, alleging that: on August 10, 1959, defendant did, "unlawfully and wilfully operate his motor boat, known as 'Wild Fire' in and among the bathers at the Ardmore Beach, a public bathing beach operated by the City of Chicago, in such a manner as to endanger the lives of said bathers." The proceedings further show in part, as follows:

"And it appearing to the Court that the defendant herein was arrested without warrant, capias or other writ and is now here present in open court, the court takes jurisdiction of the person of said defendant, and the Bailiff of this Court is ordered forthwith to take the body of said defendant into his custody and said body safely keep so that said Bailiff may have the same before this Court to answer to the plaintiff for and concerning the offense charged in said complaint, and this order shall be sufficient warrant of said Bailiff for so doing."
(Emphasis added.)

A general appearance was filed for defendant by his attorneys, and on defendant's motion the cause was continued. At the inception of the trial, on August 25th, Shaffer moved for a

discharge on grounds he had been arrested without a warrant and renewed his motion during that trial which was summarily overruled by the court.

Defendant primarily attacks the jurisdiction of the court. He contends and he claims that the court erred in overruling his motion to be discharged because of the arrest without a warrant. This was a ^{quasi-}criminal offense, and the court had ^{quasi-}criminal jurisdiction. The general rule is that a court of ^{quasi-}criminal jurisdiction is not required to inquire into the method used to bring the accused before it. "The question of alleged illegal arrest can in no way affect the judgment of conviction." *Ker v. The People*, 110 Ill. 627, *aff'd*, 119 U. S. 436; 22 Corp. Juris sec. 144, 146; *People v. Smith*, 11 Ill. 2d 280; Ill. Rev. Stat. 1959, Chap. 38, par. 660.

The defendant cites cases holding that no arrest can be made except upon reasonable ground for believing that the person arrested is implicated in a crime. This is a correct statement of the law but is not applicable here. This contention arises most frequently in cases involving false arrest or on motion to suppress evidence seized as an incident to an arrest. We hold the court gained jurisdiction on August 11, on the day a complaint was filed against defendant, when the court noting that defendant was arrested without a warrant, ordered the bailiff to take custody of the defendant. This action is similar to issuing a warrant.

The defendant further contends he was not found guilty of the crime charged in Chapter 38, par. 29 of the Municipal Code, which reads as follows:

"It shall be unlawful for any person to operate, or for the owner of any motor boat or out-board motor boat to permit to be operated, any motor boat or out-board motor boat upon the waters of Lake Michigan, along or to the east of that part of the shore line of said lake, within the limits of the city or upon any waterway in the city, in such manner as to disturb or destroy the peace and quiet of the inhabitants of the city or any part thereof."

The record discloses that in addition to the testimony of Becker and Wright, Robert Dooley, a lifeguard at Albion Beach, testified that he saw Shaffer about 7:00 P.M. pulling two water-skiers and "passed within 25 feet of the bathers at Albion Beach. He was going fast enough to sustain the skiers." Dooley got into a motor boat and, when Shaffer stopped, told him, "Please back your boat 300 yards off shore. You came within 20 feet of my swimmers back at Albion." Shaffer countered with, "How far are you from me now?" Dooley said, "I am about 20 feet." Then Shaffer left. Richard Schultz, a lifeguard testified he saw Shaffer tow two water skiers within 25 yards of his boat and swimmers were directly in back of his boat. He waved to Shaffer but Shaffer kept going. Dale Landi, a supervisor of equal rank with Becker said that he spoke to Shaffer at least twice a week during last summer and repeatedly told him of the regulations for the use of a boat within a bathing area.

Shaffer testified that he never buzzed a bather in his life. He admitted he was towing water skiers off the Albion Beach but said he was 150 yards from the beach. He said, "When the kids got off the ski, 'he'," apparently referring to Dooley, "came in and said that I came too close to the swimmers," and I said,

"How close do you think I came to the swimmers?" He said, "20 feet." "I looked at him." "He didn't know what 20 feet is." "It was maybe 50 yards." He denied that Landi spoke to him regularly last year but admitted he spoke to him on one occasion.

Five witnesses in all testified that Shaffer's boat pulling water skiers was propelled into the area of bathers. We can come to only one conclusion, that the defendant, although forewarned in previous years was determined to contradict the authority of the lifeguards and to ignore their complaints. Upon review of this record the trial court was justified in finding that Shaffer repeatedly operated his motorboat in such a manner that he disturbed and destroyed the peace and quiet of the bathers, as well as endangering their lives at the public beach in violation of Chapter 38, par. 29 of the Municipal Code.

There remains the contention of the defendant that the conduct of the trial court was such that the defendant did not receive a fair trial, in that the trial judge asked numerous questions during the trial. The extent to which this shall be done must largely be a matter of discretion, to be determined by the circumstances of each particular case, but in so doing he must not forget the function of a judge, and assume that of an advocate. (The People v. Bernstein, 250 Ill. 63; O'Shea v. People, 218 Ill. 352; Dunn v. People, 172 Ill. 582.) The cases cited by defendant in support of this contention are generally found in jury trials. We do not see any similarity to the type of prejudicial remarks that were made by the trial court in the case of

Olson v. Grant, 4 Ill. App. 2d 308. In the case at bar, the finding of the trial court was made on a full trial of the merits, and after defense presented its case and rested. We recognize that the presence of the case load in the Municipal police courts often results in efforts by the trial judge to question witnesses themselves to expedite the proceedings.

In cases where the evidence on the issue is in conflict this court will accept the finding of the trial court unless it is clearly unreasonable. (People v. Peterson, 17 Ill. 2d 513; People v. Mathews, 406 Ill. 35.) The trial judge apparently believed the testimony of the lifeguards and their supervisors and we are not prepared to say his conclusions were unreasonable. The People v. Florito, 19 Ill. 2d 246.

For the foregoing reasons, the judgment of the trial court is affirmed.

AFFIRMED.

KILEY, P.J. AND MURPHY, J. CONCUR.

ABSTRACT ONLY.

CITY OF CHICAGO, a Municipal Corporation,

v.

Defendant - Appellant.

OF CHICAGO.

The statement of claim alleges, under headings of Fire, Housing and Electrical, seventeen violations of the Building Code. The date of the violations is set out as April 9, 1959. Many of the violations, unchallenged here, are of a serious, dangerous nature. It is unnecessary to dwell on the evils of slum conditions and the human weaknesses and exploitation involved in operation of substandard illegal housing. Judge Hugo Friend speaks of these at length in *City of Chicago v. Hadesman*, 17 Ill. App. 2d 150.

Joseph Woolf was named a defendant with Porter and was nonsuited by the City after answering that Porter was owner on April 9, 1959, and for five years previously. Porter, subsequently in a motion, stated Woolf was "record owner" on that date. At the trial he introduced a quitclaim deed from Woolf dated July 1, 1959. But he admitted residing in the property on April 9, 1959, and collecting rents which he says were turned over to Woolf. He says he told the inspectors Woolf did not live there.

Chapter 39-2 of the Municipal Code of Chicago makes liable for violation of Building, Electrical and Fire Regulations the owner and "his agent for the purpose of managing, controlling or collecting rents...." We think the trial court was justified in finding that Porter had sufficient interest to be responsible for the violations.

Defendant argues that he had no notice. No formal notice is required under the Code, *City of Chicago v. Hadesman*, 17 Ill. App. 2d 150; Porter is presumed to know of the regulations, *City of Chicago v. Atkins*, 18 Ill. App. 2d 177; and after the April inspection he accepted a deed in July and by October had not complied. There is no merit in his argument.

For the reasons given the judgment is affirmed.

AFFIRMED.

MURPHY AND BURMAN, JJ. CONCUR.

ABSTRACT ONLY.



47878
47879

CHARLES A. COMISKEY,

Appellant,

v.

THE CBC CORPORATION, DOROTHY C.
RIGNEY, Executor of the Will of
Grace R. Comiskey, deceased;
SHAREHOLDERS OF AMERICAN LEAGUE
BASE BALL CLUB OF CHICAGO, an
Illinois Corporation; AMERICAN
LEAGUE BASE BALL CLUB OF CHICAGO,
an Illinois Corporation,

Appellees.

APPEAL FROM CIRCUIT
COURT COOK COUNTY

MR. JUSTICE MCCORMICK DELIVERED
THE OPINION OF THE COURT.

The two appeals herein are taken from a decree of the Circuit Court of Cook County dismissing plaintiff's complaint for a temporary and permanent injunction against the defendants, and from the denial by the trial court of plaintiff's motion, brought within thirty days, to vacate the said decree.

Charles A. Comiskey, plaintiff in the suit, is a shareholder of the American League Base Ball Club of Chicago, a corporation, hereafter referred to as "Club." The defendants are the Club, the "Shareholders of American League Base Ball Club of Chicago," Dorothy C. Rigney, executor of the will of Grace R. Comiskey, deceased, and The CBC Corporation.

It appears from the record that at a stockholders' meeting of the Club on November 7, 1956 Grace R. Comiskey, Dorothy C. Rigney, Charles A. Comiskey and Roy J. Egan were elected directors to serve until the next annual meeting and until their successors were duly elected and qualified. On

26 1.A. 330

December 10, 1956 Grace R. Comiskey died. Subsequent to her death the bylaws of the corporation were amended to reduce the number of directors of the Club from five to four. On March 10, 1959 The CBC Corporation, a Delaware corporation, purchased Mrs. Rigney's interest in 3,235 shares (54%) of the stock of the Club. See In re Estate of Comiskey, 24 Ill. App. 2d 199.

On March 10, 1959 Dorothy C. Rigney, as secretary of the Club, sent out notices of a special meeting of stockholders to be held March 20, 1959 for the purpose of holding an election to fill a vacancy in the office of director caused by the death of Grace R. Comiskey. At that time there were three directors in office. No election for directors had been held since November 7, 1956. On March 17, 1959 plaintiff filed a complaint in the Circuit Court of Cook County praying that the court issue a temporary injunction enjoining the defendants and each of them from holding a special meeting on March 20, 1959 for the purpose of electing an additional holdover director or from transacting any business at the meeting other than an election of the entire number of directors, and the complaint further prayed that upon hearing the injunction be made permanent.

On April 9, 1959 Dorothy Rigney, as executor, and The CBC Corporation filed motions to dismiss the complaint. On April 9th the plaintiff filed a motion asking for a temporary injunction to prevent the holding of any meeting. On April 30, 1959, after hearing, the trial judge announced that he could not find any legal or equitable grounds on which the injunction

could issue and that therefore he was going to deny the petition for the writ of injunction. On May 4th the trial judge signed a final decree denying plaintiff's motion for a temporary injunction and dismissing the action on the motions of certain defendants. On June 18, 1959 the court entered an order denying plaintiff's motion to vacate the decree. An appeal was perfected from that order, which is case No. 47878. Case No. 47879 is an appeal from the decree of the court entered on May 4, 1959. The two cases are consolidated here.

On April 30th, after the trial court had refused to grant a temporary injunction, a meeting of the stockholders was held, at which meeting William Veeck was elected as a director to fill the vacancy caused by the death of Grace R. Comiskey. The ground of the plaintiff's motion to vacate the decree entered on May 4th was that at the time when the decree was entered the proceedings were moot inasmuch as the meeting had been held and a director elected, which meeting and election were sought to be prevented by the suit for an injunction. The defendants argue that at the hearing on April 30th it was understood by all the parties through their counsel that the suit would be dismissed by a decree to be prepared by the attorney for The CBC Corporation and presented to the court later, and that on May 4th, when the decree was entered, counsel representing plaintiff was present in court, made no objection to the entry of the decree, and, according to an uncontradicted statement made to the court by the attorney representing The CBC Corporation, suggested certain changes concerning the

wording which the court accepted. Defendants also state that while there is no question that it is the law that a decree in an equitable proceeding does not become final until it is formally entered by the court, it is well known it is common practice for an understanding to be reached between counsel as to the terms of a decree to be prepared and entered at a later date. It seems evident from the record that the court and counsel well understood that a decree was to be prepared by the attorneys representing The CBC Corporation and entered later dismissing the suit. At that hearing, after the court had refused to issue a temporary injunction and had refused to hold the case in abeyance until the plaintiff could appeal from that order, plaintiff's counsel stated that he thought the court should dismiss the complaint and further stated: "There would be no purpose in setting it for any final hearing, because they are going out to the Ball Park right now to hold the meeting and disenfranchise our client, as far as we're concerned." Counsel for The CBC Corporation then stated that he would draw an order "dismissing the complaint, as well as denying the motion for temporary injunction." The plaintiff's attorney said, in response to that statement, "I suggest that you prepare an order and submit it to us, and we don't have to come in." Plaintiff's counsel further suggested that the order should be presented either on the next day or on Monday following. When the decree was presented on May 4th all the parties were in court represented by counsel. No objection was made by plaintiff at that time to the entry of the decree, and when plaintiff's



motion to vacate the decree was argued June 1, 1959, counsel for The CBC Corporation stated that he had drawn the decree at the suggestion of counsel for plaintiff and that on May 4th counsel for plaintiff was present, acquiesced in the decree and made some change in the wording which was accepted by the court. This statement was not contradicted by counsel for plaintiff. Defendants contend that plaintiff is therefore estopped from now objecting to the entry of the decree on the ground that at the time of entry the cause was moot. The theory of the defendants is that at the time when the understanding was reached between the court and counsel the cause was not moot, and the fact that the meeting was held in the afternoon of the day the understanding was reached and the decree was entered the following Monday could have no effect. This contention is supported by the fact that plaintiff's counsel made the suggestion that the order dismissing the case be entered the next day or the following Monday. From statements made by plaintiff's counsel in court it was clearly evident that he had considered the fact that the meeting which he sought to prevent would have been held at a time prior to the days suggested by him for the entry of the order. It is also worthy of note that at the time of the hearing on April 30th the trial court stated that he could not find any legal or equitable ground on which the injunction should issue, and further stated that he was "going to deny the petition for the writ of injunction." From the court's statement it could and probably should be inferred that he had considered not only the question

of the issuance of the temporary injunction but also the ultimate issues raised by the complaint.

We do not believe it is necessary for us to pass on the question raised in case No. 47878 that the trial court erred on June 18th in denying the motion of the plaintiff to vacate the decree entered on May 4th, but if it was a matter on which we were required to pass, we would have no hesitation in affirming the order of the trial court.

Both Dorothy C. Rigney, as executor of the will of Grace R. Comiskey, deceased, and 54% of the shareholders of the Club have joined in the briefs filed by The CBC Corporation. After this court took jurisdiction The CBC^{Corporation} filed a motion to dismiss the appeal in case No. 47879. In this motion Mrs. Rigney joined. It is our opinion that should they prevail in that motion case No. 47878 must fall also. The two appeals are so closely related and intermeshed that the dismissal of one appeal automatically carries with it the other.

The motions of The CBC Corporation and Mrs. Rigney, supported by affidavits, sought dismissal here on the grounds (1) that the controversy which was decided by the trial court was one involving the validity of an election of a director to fill a vacancy on the board of directors of the Club, and that that controversy has been rendered moot by the subsequent election of a new board of directors, which ended the term of office of the preceding board, (2) that the plaintiff's conduct subsequent to the entry of the decree appealed from is inconsistent with the position he takes on appeal and estops him

from going further with the appeals, and (3) that the trial court entered the decree appealed from on the inducement of the plaintiff. These motions, with countersuggestions, were taken with the case.

From the affidavits supporting defendants' motions and the minutes of the meetings filed as exhibits, it appears that on May 5, 1959 a special meeting of the board of directors was held. The plaintiff, Egan, Veeck and Mrs. Rigney were present. Plaintiff, as vice president of the Club, presided over the meeting and made no objection to Veeck's presence and participation as a director. After calling the meeting to order plaintiff stated that by agreement of the directors present the first order of business would be a proposed amendment to the bylaws of the Club increasing the number of directors to five. The adoption of the amendment was moved and seconded and plaintiff called for a vote. He polled each of the directors present, including Veeck, recorded the favorable vote of Egan, Mrs. Rigney and Veeck, and the negative vote of himself, and announced that the vote was three to one in favor of adoption of the amendment. The meeting was then adjourned to reconvene on May 8, 1959, and at that meeting Egan, Mrs. Rigney, Veeck and plaintiff were present. The meeting again was presided over by plaintiff, and no objection was made to Veeck's presence or to any other matter at that meeting by anyone. After the meeting was called to order the directors considered as the first order of business a series of proposed amendments to the bylaws. These amendments were designed to create and specify the duties of a new office of the Club—the office of executive

vice president. The adoption of the amendments was moved and seconded, and plaintiff again polled the directors, including Veeck, recorded the vote, and announced the result as four in favor and none opposed. The election of the following officers was then moved and seconded: Veeck as president, plaintiff as executive vice president, Henry B. Greenberg as vice president and treasurer, and Milton H. Cohen as secretary. Plaintiff called for a vote and again announced that the vote was four to none in favor of the resolution. Bank resolutions were adopted authorizing Veeck and plaintiff, among others, to sign checks on the Club's bank accounts, and granting Veeck and plaintiff, among others, access to the Club's safe deposit boxes, and since that date plaintiff has accepted the office of executive vice president and has so held himself out.

Another meeting of the board of directors was held on June 1, 1959. Mrs. Rigney, Egan and Veeck were present. Plaintiff was absent because of illness. The business transacted at that meeting included the passage of a resolution establishing new monthly rates of compensation for the executive officers of the Club effective May 9, 1959. The resolution fixed the rate of compensation for the office of executive vice president at a monthly salary approximately \$583 higher than plaintiff's previous monthly compensation as vice president, and since that meeting plaintiff has, without making any objection, accepted the money.

A special meeting of shareholders of the Club was held on June 15, 1959. The meeting was called to elect five

directors. At that meeting the plaintiff had incorporated in the record a letter addressed to The CBC Corporation. In that letter he stated that the adoption of the bylaws at the meeting of May 5th was void and that consequently only four directors could be elected at the instant meeting. At the meeting all the shareholders were present in person or represented by proxy. At that meeting Veeck presided, and five directors were elected, including Veeck and plaintiff.

In an affidavit attached to his countersuggestions the plaintiff denies that the minutes of the meeting of the board of directors on May 5th recording a purported statement made by the chairman that there was an agreement that the amendment of the bylaws would be taken up as the first order of business are true. With reference to the meeting of the board of directors held on May 8th, the plaintiff asserts that a statement in the minutes that Milton Cohen, one of the attorneys for The CBC Corporation, said that "if all of the directors agreed, it was proposed to amend the By-Laws of the Company to provide for an office of Executive Vice-President and then to elect a full slate of officers of the Company" was not accurate in that the plaintiff did not agree with any of the directors. However, there is nothing contained in plaintiff's affidavit showing that he voiced his disagreement, nor is there any denial in the affidavit that he voted in favor of the amendments and for the election of the officers.

The first objection made by plaintiff to the defendants' motions to dismiss the appeals on the ground that they have

become moot is that the questions concerning the transactions alleged in the motions as grounds for dismissal of the appeals are not properly raised in this court since they have not been presented to and passed on by a trial court.

A case is moot when it does not involve any actual controversy, and when the issues upon which a determination by the trial court was had and an appeal was taken no longer exist, the appeal should be dismissed. In La Salle Nat. Bank v. City of Chicago, 3 Ill. 2d 375, the court says:

"Since the existence of a real controversy is an essential requisite to appellate jurisdiction, the general rule is that where a reviewing court has notice of facts which show that only moot questions or mere abstract propositions are involved, it will dismiss the appeal or writ of error even though such facts do not appear in the record. * * * [Citing cases.] From the necessity of the situation courts allow facts which affect their right and duty to proceed in the exercise of their appellate jurisdiction, but which do not appear in the record before it, to be proved by extrinsic evidence. * * * [Citing cases.] Such a fact may be presented, as here, by motion supported by affidavit."

The questions raised by the motions and affidavits of defendants with reference to the dismissal of the appeals are properly before this court.

The only question presented by the plaintiff in this court is his contention that the stockholders' meeting held on April 30th, at which meeting William Veeck was elected as a director of the Club, was invalid. If an entire new board of directors was validly elected by the stockholders after the decree appealed from was entered, then the question of the validity or invalidity of the meeting and election of a director on April 30th is moot. Veeck's right and title to the office of director would then

depend upon the subsequent election.

The plaintiff, however, in his countersuggestions contends that the election of Veeck as a director was invalid and that since the plaintiff voted against the amendment of the bylaws increasing the number of directors from four to five, he is not bound by that bylaw. At the meeting of May 5th Veeck appeared as a director without objection on the part of the plaintiff. At that time the number of directors provided for by the bylaws was four. The Business Corporation Act of Illinois provided, in section 37 (Ill. Rev. Stat. 1957, ch. 32, par. 157.37), that a majority of the number of directors fixed by the bylaws shall constitute a quorum for the transaction of business, and that the act of a majority of directors present at a meeting at which a quorum is present shall be the act of the board of directors. The bylaws of the corporation are substantially in accord. Four directors were provided for by the bylaws, and if we should assume that Veeck was not properly a director at that time, nevertheless three other holdover directors validly in office were present. Those three directors constituted a quorum, and if we would disregard Veeck's vote in favor of the amendment, nevertheless the vote was carried two to one—a majority of the directors present. See Westlake Hospital Ass'n v. Blix, 13 Ill. 2d 183. This alone would validate the adoption of the amendment to the bylaws.

The only substantial protest made by the plaintiff in his letter recorded in the minutes of the stockholders' meeting of June 15th is that the election of five directors at that

meeting would be invalid because the amendment to the bylaws increasing the number of directors was improperly adopted. As we have pointed out above, that position is untenable. Furthermore, the plaintiff had at other meetings held prior to the meeting of June 15th acquiesced in and consented to Veeck's presence and participation as a director of the Club. At the meeting held on May 8th the plaintiff presided without any objection to Veeck's presence. A motion was there passed creating the office of executive vice president. The plaintiff polled the directors, including Veeck, and announced the result as four in favor and none opposed. While the plaintiff was still presiding Veeck was elected president of the Club and the plaintiff executive vice president, bank resolutions were adopted authorizing Veeck and the plaintiff, among others, to sign checks and granting Veeck and the plaintiff, among others, access to the Club's safe deposit boxes, for all of which plaintiff voted and recorded the vote of Veeck. Since that time the plaintiff has accepted the office of executive vice president and has so held himself out. On June 1st, at a meeting of the board of directors held in the absence of the plaintiff, Mrs. Rigney, Egan and Veeck were present, and at that time they voted a considerable increase in the salary of the plaintiff in his office as executive vice president. The plaintiff since that time has, without objection, accepted the checks reflecting the increase. The plaintiff, by his acquiescence, waiver and inconsistent conduct, cannot now attack the validity of Veeck's position as a director of the Club.

Plaintiff agrees that it is well established law that a stockholder of a corporation may waive his right to contest the validity of a bylaw or be estopped to set up its invalidity by participating in its adoption or otherwise recognizing it or acquiescing in it and that there is no waiver or estoppel where there is no participation in the adoption of the bylaw and where there has been no holding out or recognition of it as valid. As was said in Fireman's Fund Indemnity Co. v. Hudson Associates, 91 A.2d 454 (N.H.):

"The word participating has no clear and unmistakable meaning. In its primary sense, it means simply a sharing or taking part with others but when it is applied to a particular situation, it takes on secondary implications that render it ambiguous. Under some circumstances it may denote a mere passive sharing while under other circumstances an implication of active engagement may accompany its use. 67 C.J.S., Participate, p. 879."

See Frankel v. 447 Central Park West Corporation, 28 N.Y.S.2d 505, and Levin v. Hunter, 6 Ill. App. 2d 461.

In the case before us the plaintiff went far beyond a passive attendance at the meeting of May 5th. Plaintiff, as vice president, presided over the meeting, and made no objection whatsoever to Veeck's presence and participation as a director. He accepted the motion to increase the number of directors to five, presented it to the directors, polled them and recorded the votes, including that of Veeck, and announced the vote as three to one in favor of the adoption of the amendment. It is true that he voted against the amendment. A mere negative vote on the part of a director does not render him a nonparticipant in the meeting. In our opinion the adoption of the bylaw increasing the number of directors of the Club from four to five was valid—as we have

indicated—whether or not Veeck could properly be considered as a director, and in any case the plaintiff by his participation in the meeting has waived any right which he might have had to contest its validity. Plaintiff is also barred because his conduct in presiding at meetings and voting for various bylaws inuring to his favor and accepting an increase of salary voted to him by the directors of the Club, including Veeck, is so utterly inconsistent with the position he now takes that he cannot now be heard to contest the validity of the acts of the board.

The motion to dismiss the appeal taken from the decree entered on May 4, 1959 (case No. 47879) is allowed. As we have indicated, the appeal taken from the order of June 18, 1959 denying plaintiff's motion to vacate the decree (case No. 47878) would thereupon fall, and it is our opinion that our decision on that motion is sufficient without specifically affirming the order appealed from in case No. 47878. Accordingly, both appeals are dismissed.

Appeals dismissed.

Dempsey, P.J., and Schwartz, J., concur.

AGST.



47922

FRED O. FOSTER,

Plaintiff-Appellee,

v.

NEW YORK, CHICAGO AND
ST. LOUIS RAILROAD
COMPANY, a corporation,
also known as The Nickel
Plate Road,

Defendant-Appellant.

APPEAL FROM CIRCUIT

COURT OF COOK COUNTY.

26 LA. 337^{2d}

MR. PRESIDING JUSTICE DEMPSEY DELIVERED
THE OPINION OF THE COURT.

A verdict for \$31,250.00 was returned in this personal injury case, brought under the Federal Employers' Liability Act. The defendant complains about the admission of improper evidence, the giving and refusing of instructions, errors in argument and the size of the verdict.

Fred Foster had been employed by the defendant for 27 years. He was working as a flagman on March 7, 1957, and was injured while attempting to board a moving engine in the railroad's yards at Delphos, Ohio. The engine was one of two coupled diesel engines which were backing up preparatory to switching to another track. On them at the time were the head brakeman, who was riding on the running board of the front one, the fireman and the engineer, who were on the right and left sides respectively, of the rear one. Foster tried to get on the rear engine on the fireman's side. He said he intended to ride to a switch, some 400 to 500 feet away, for the purpose of lining it up so that the engines could complete the

movement to the next track; he said throwing the switch was the responsibility of the engine crew and was part of his job, and that sometimes he walked and sometimes he rode to perform this duty. He testified he signaled that he was going to get on, that the engine slowed down and the brakeman got off, but that the speed was increased just as he got hold of the grab irons to swing himself aboard, that his foot slipped off the platform and he was thrown to the ground. The brakeman admitted receiving the signals, the fireman denied seeing them, and the engineer said none were transmitted to him; he said he slowed down to let the brakeman off and speeded up immediately thereafter without knowing that Foster was getting on.

Count I, as amended, charged that the defendant failed to keep a sufficient lookout, failed to observe Foster's signals and accelerated the engine as he was attempting to get on, failed to provide a reasonably safe place to work by permitting areas within its yards to be oily thereby causing Foster's shoes to become slippery, and permitted the footboard of the engine to be in an unsafe condition due to the presence of greasy oil and road scum. Count II of the two count complaint charged a violation of the Federal Boiler Inspection Act, 45 U.S.C.A. sec. 23, because the footboard of the engine was in a dangerous condition.

Although Foster was contradicted in several particulars by some of his fellow employees, there is

testimony in the record supporting every allegation of the first count of the complaint with the possible exception of the unsafe condition of the footboard. The railroad maintains that there was no such evidence, and that the court recognized this by granting its motion for a directed verdict on count II, but then inconsistently denied the same motion on the same charge in count I. The dispute over the sufficiency of this evidence is the immediate problem to be determined.

While being cross-examined Foster testified: "I had to see the footboard before I stepped on it, I noticed fuzz on it—road fuzz...'skim' or film.... It was grey in color.... Well, that is what was on it...it was there.... I saw the footboard." But before the cross-examination was completed these questions were asked and answered:

Q. Did you see anything else about the footboard...?

A. You couldn't distinguish at that time just what was there.

Q. That is the exact point of my question.

A. You want me to say there was a heavy coat—

....

Q.As you got ahold with your right hand and swung around the engine, did you observe the footboard or its condition?

A. I didn't have time.

....

Q. Then I take it that you did not observe the condition of the footboard, am I correct?

A. I don't know how to answer you.

Q. Well, what is it that you don't know—what is unclear about my question, what is the trouble? Did you observe the condition of the footboard, and you said—

A. No, sir, I did not.

In a statement given to a claim agent a month after the occurrence Foster said: "I did not personally inspect these engines and I know nothing about the condition of them or whether or not there was anything defective with any of the appliances. There might have possibly been some oil on the steps...."

There was indirect evidence on the subject which consisted of two parts. The first was evidence that this engine had been out on the road every day for 30 days before the accident, and the testimony of three railroad men who said that when engines are used over the road they accumulate the so-called "road scum." The second was the content of reports made by engineers who operated the engine. An Interstate Commerce Commission regulation requires daily reports by the engineer concerning the condition of the engine. The defendant introduced one of these for the day of the accident and one for the day following; neither showed a need for washing the engine. The plaintiff, in rebuttal, introduced the daily reports from February 1st to March 31st, 1957, none of which contained any reference to washing or cleaning the exterior of the engine. The plaintiff reasons that a fair inference from the reports is that the engine

The Civil Practice Act, sec. 68(4), ch. 110, Ill. Rev. Stat. 1959, provides that if several grounds are pleaded in support of the same demand, no verdict shall be reversed for the reason that the evidence is insufficient to sustain one of the grounds unless a motion has been made to withdraw that ground and it further appears that prejudice resulted by the motion being denied.

Our conclusion, about there being some evidence supporting the allegation, is determinative of the defendant's contention that the court erred in submitting an instruction to the jury which included this allegation. This instruction, which outlined the complaint and answer, also is criticized because the exact words of the complaint were not used in describing the allegations. The allegations were not distorted and presenting them in more informal language is unobjectionable. Indeed, it would be well if all instructions were couched in words readily understood by the average juror.

Another instruction quoted the Interstate Commerce Commission regulation previously referred to. This regulation had been admitted into evidence, and admitting it and giving it as an instruction are assigned as errors. The plaintiff did not place it in evidence until after the defendant had examined the engineer about making daily reports, had another witness identify the reports of March 7th and 8th, and had the witness examine the reports from February 1st to

March 31st, 1957. In view of the injection of the reports into the case we do not believe it was error to admit the regulation, which explained why the reports were necessary. Similarly, since all the reports were subsequently placed in evidence, and since there was some evidence supporting the charge that the footboard was in an unsafe condition, it was not improper for the court to give an instruction embodying the regulation.

A second Interstate Commerce Commission regulation was read into evidence but no instruction was offered pertaining to it. This regulation prohibited accumulations of oil, waste or other obstructions on deck plates, or floors of cab passages and of compartments. There was no evidence that the footboard, from which Foster claimed he slipped, was also termed a deck plate or was equivalent to the floor of a cab. In the absence of such evidence this regulation was irrelevant; it obviously does not pertain to any issue and it should have been withdrawn or stricken when this became apparent. The error was minor. A judgment will not be reversed for error unless it appears such error affected the outcome of the trial. Lindroth v. Walgreen Co., 407 Ill. 121, 136; Rotheli v. Chicago Transit Authority, 7 Ill. 2d 172, 175.

The final plaintiff's instruction complained about is the following:

"The Court instructs the jury that if under the evidence and instructions of the court, you find that the plaintiff, Fred Foster, has sustained damages for which he is entitled to recover under the evidence and the instructions of this Court,

then to enable the jury to estimate the amount of such damages, it is not necessary that any witness should have expressed an opinion as to the amount of such damages, but the jurors may make such estimate from the facts and circumstances, proved by the evidence, considering these in connection with their knowledge, observation and experience in the ordinary affairs of life."

The defendant argues that it is reversible error to give an instruction such as this unless it is limited to conscious pain and suffering and cites Hopkins v. Whelan, 217 Ill. App. 248, 251. In the Hopkins case the plaintiff's allegations and evidence related not only to pain but to elements of damage which were capable of precise proof, but which had not been proven. In the present case Foster's yearly salary had been proven and his inability to work had been attributed to his accident; there were no other damages capable of exact measurement. There was another given instruction which told the jury what specific elements of damage could be considered, if the jury found that such elements had been proven by the preponderance of the evidence. The instructions supplemented each other and were correct under the evidence in this case.

Three refused instructions are listed as reasons for reversal. Two of these were part of a series of 12 instructions, peremptory in character, which were based on the evidence or on various phases of it. The first refused instruction directed a verdict of not guilty on the charge of negligently accelerating the engine if the defendant did not know, and had been given no grounds for believing, that the

plaintiff was going to board the engine. Like many of the refused instructions, this one violated the rule that an instruction directing a verdict must contain all the elements necessary to sustain such a verdict. Hanson v. Trust Co., 380 Ill. 194. The instruction ignored the possibility that the defendant's failure to keep a proper lookout might have prevented it from knowing if the plaintiff gave adequate and timely signals. The jury could easily have found that the fireman did not keep a proper lookout. He testified he saw the plaintiff talking to two other men near a yard house but that he did not see him come over to the track and did not see him try to get on. Although the plaintiff was thrown to the ground, the engine went on its way and it was not until later that the fireman learned that an accident had happened. The instruction can also be criticised for the use of the word "believing." The test is not whether the signals were believed but whether the defendant saw them or, by the exercise of reasonable care, should have seen them.

The same word was used in the second refused instruction. This instruction directed a verdict of not guilty if the jury found that the plaintiff was injured solely because he tried to get on the engine while it was going too fast, without having previously given the other members of the crew thereon grounds for believing that he was going to go aboard. It is subject to the same criticism, and it was also superfluous, for the court instructed the jury on behalf of the defendant

that if it found from the evidence that the plaintiff received his injuries solely on account of his negligence, it should find the defendant not guilty.

The last refused instruction was on the preponderance of the evidence. It told the jury that if it found the evidence evenly balanced, or if the evidence preponderated in favor of the defendant, it should find the defendant not guilty. Other instructions informed the jury that it was necessary for it to find by a preponderance of the evidence that the defendant was guilty of negligence. The proffered instruction was therefore repetitious. Goertz v. Chicago & N.W. Ry. Co., 19 Ill. App. 2d 261.

During his argument to the jury the plaintiff's attorney mentioned that Foster had a previous record of safe conduct, and that if he did not the railroad would have informed the jury about it. The defendant's counsel objected, then and now, that he could not have shown prior negligence. This is generally true; however, the plaintiff and others had testified, without objection from the defendant, that he never had an accident during his 27 years with the railroad. Since the testimony was in the record it could have been controverted if the defendant had so desired. The error was not the argument of counsel, it was the introduction of the issue which gave foundation for the argument. Of this the defendant is in no position to complain.

A further point arises from the final argument of the

defendant's attorney. An objection was sustained to his statement that the complaint was amended during the trial to include the charges of the missed signals and the engine's picking up speed. The defendant takes the position that it was proper to inform the jury of the late amendments because it was a circumstance which suggested that the charges were just an afterthought and were unfounded. We believe the ruling of the court was correct. This was not a proper subject for jury discussion. Amendments may be made at any time. Section 46, ch. 110, Ill. Rev. Stat. 1959. If an amendment to conform to the proof could not be made without subjecting the party making it to suspicion, the freedom of amendment would be inhibited. It would be unfair to an attorney, whose pleadings may have been hastily drawn or formulated upon incomplete information, to be placed in the dilemma of either not amending and incompletely pleading his case or amending and having his motives criticised before a jury. Yuckman v. Considine, 175 Ill. App. 613.

The defendant protests that the verdict is grossly excessive and suggests that the jury failed to consider the plaintiff's negligence which it claims contributed to his injury. Foster was over 63 years old at the time of the accident and was making about \$6,000.00 a year. The only medical testimony offered was in his behalf. A doctor said he was no longer able to work as a flagman because the comminuted fracture of the shoulder, which he had suffered, had resulted in limitation of the motion of his shoulder

-12-

and arm. He had talked of taking his pension at 65 but there was no certainty that he would have done so, and if he did he would have reduced his income from \$500.00 to \$116.00 a month. By working for 3 more years he would have been entitled to a full pension. The evidence showed that many railroad men work to 70 and beyond. In view of Foster's loss of earnings, his injuries and his continuing pain, we cannot say that the verdict is excessive or that it was not diminished in proportion to what the jury might have thought was his contributory negligence.

The judgment of the Circuit Court is affirmed.

Affirmed.

Schwartz and McCormick, JJ., concur.



47901

Plaintiff-Appellant,

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

MARGARET FITZGERALD,

Defendant-Appellee.

This is a personal injury case brought by the wife of a lessee, against the owner of a multiple apartment building, for injuries sustained by her on the front stairway of the building. The owner moved for summary judgment on the ground that the lease contained an exculpatory clause which provided that the lessor would not be liable to the lessee, or to any member of his family, or to any person claiming through him, for injury arising from or in the building. The motion was granted.

D. G. Swanson & Co., No. 47787, filed March 23, 1960; Booth v. Cebula, No. 47789, filed April 13, 1960. These decisions are controlling in the present case as the lease herein was signed February 18, 1957, and the injury occurred during the term of the lease.

The Valentin case also held that a wife, who had not signed a lease, was not bound by the lease's exculpatory clause. With but one exception the facts in this case are similar to those in the Valentin case. The exception is a provision in the exculpatory clause of this lease pertaining to the lessor not being liable to any member of the lessee's family. These words were not in the Valentin lease but the difference is immaterial and would not affect the conclusion we have reached. What was said in the Valentin opinion is equally applicable here. We concur with the opinion of the court in that case.

The summary judgment is reversed and the cause is remanded for further proceedings consistent with the views herein expressed.

Reversed and remanded.

Schwartz and McCormick, JJ., concur.

A circular stamp from the Chicago Bank Association, dated May 1914, is visible in the upper left corner of the document.

THE PEOPLE OF THE STATE OF
ILLINOIS,

ERROR TO MUNICIPAL

COURT OF CHICAGO.

Plaintiff in Error.

26 LA. 364²⁶

Shopping bags were placed in a rack in the store, and patrons helped themselves, putting into a slot provided for that purpose, ten cents for each bag. The state produced a security agent for the store who testified that he saw defendant take a bag and that he did not deposit any coins to cover the cost. A Chicago police officer was also on the scene, but could not say that defendant failed to deposit a coin or coins in the slot. After taking the bag, defendant went to a nearby locker in the store and took therefrom a suit box. As he left the store by a nearby door, he was accosted by either the

store's agent or the police officer and questioned. There is a disagreement as to who questioned defendant first, but that is not important for our purpose.

What does appear is that suspicion was directed to the suit box, rather than to the bag. It was demonstrated by defendant that the box contained goods properly purchased by him. He was then booked for theft of the shopping bag. As we have said, the state's only witness to the offense was the security agent for the store. Defendant, on the other hand, testified that he did deposit ten cents, and he produced a witness, a school teacher friend of his, who happened to be in the store at the same time and saw defendant get the shopping bag and put a coin or coins in the slot. We cannot see how her testimony can be disregarded. The state did not prove its case beyond a reasonable doubt.

Judgment reversed.

McCormick and Dempsey, JJ., concur.

CONTINENTAL ILLINOIS NATIONAL
BANK AND TRUST COMPANY, a
corporation,

 V_0

Defendant-Appellant.

26 LA. 305²¹

This suit for declaratory judgment charged that the defendant failed to make two consecutive payments on the purchase price of a truck and that he had, contrary to the provisions of a conditional sales contract, removed the truck from Illinois. The complaint alleged that an actual controversy existed because the plaintiff claimed and the defendant denied that there was a default, that all money due under the contract became payable and that it had the right to repossess.

The decree, which was marked "O.K." by the defendant's attorney, found the issues for the plaintiff. The defendant, through new attorneys, moved to vacate and for a new trial. The motion charged that the defendant had been advised by his previous counsel

that the hearing, which was held preliminary to the decree, was to be a pretrial conference and therefore he had not been prepared to present his evidence. The motion took exception to the factual findings of the court and went on to relate facts tending to substantiate the defense. The motion was denied and this appeal followed.

The defendant contends that the decree is contrary to the evidence, that the parties had modified the contract by agreeing to extend the time for the payments, and that the taking of the truck from the state was justified under the contract and was done with the knowledge of the plaintiff.

These contentions make it necessary to consider the evidence, and the decree related that the court heard oral and documentary proof. But the record before us contains the pleadings only; there is neither a report of proceedings nor an agreed statement of facts showing what proof was presented. Under this condition we must assume the evidence supported the judgment of the court. The defendant's brief makes the opposite assertion:

"Point IV. THERE BEING NO TRANSCRIPT OF THE TESTIMONY ON WHICH THE ORDER, JUDGMENT AND DECREE OF THE TRIAL JUDGE IS PREDICATED, AND ENTERED ON JUNE 17th, 1959, SUCH ORDER, JUDGMENT AND DECREE, MUST BE REVERSED."

No case is cited supporting this proposition, and the rule is to the contrary. People ex rel Rose v. Craig, 404 Ill. 505; City of Chicago v. Franks, 22 Ill. App. 2d 536; A.B.C. Loan Co. v. Campbell, 1 Ill. App. 2d 297; Lambert v. Dabbs, 302

Ill. App. 400.

Paragraph 9 of the conditional sales contract disposes of the contention that there is no provision in the contract prohibiting the use of the truck outside of Illinois:

"Buyer...agrees to keep the Property principally at his address...except for temporary and ordinary use thereof in the State of Illinois, unless otherwise approved in writing by Seller."

The answer did not deny the charge that the defendant had taken the truck to Arizona where it was later repossessed. There is nothing in the record to show that the plaintiff had approved its removal. In the absence of such proof, there is no basis for disturbing the court's finding on this point.

The decree of the Circuit Court must be affirmed.

Affirmed.

Schwartz and McCormick, JJ., concur.

ARST



47339

RICHARD ZANK, Administrator of the
Estate of LILLIAN ZANK, Deceased,

Plaintiff - Appellee,

v.

CHICAGO, ROCK ISLAND AND PACIFIC
RAILROAD COMPANY, a corporation,

Defendant - Appellant,

and EDNA STANGLE,

Separate Defendant - Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

2d
261A.339

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action brought by decedent's husband as administrator of her estate after her death from "other causes". Verdict and judgment were in plaintiff's favor for \$15,000 and both defendants appealed to this court. We reversed and remanded with directions to enter judgment for defendants notwithstanding the verdict. Zank v. Chicago, R. I. & P. R.R., 19 Ill. App. 2d 278. The Supreme Court granted leave to appeal, reversed the judgment of this court, and remanded the cause with directions for us "to affirm the judgment ... if no further reversible error is found." Zank v. Chicago, R.I. & P. R.R., 17 Ill. 2d 473, 485.

Plaintiff's decedent was a passenger in defendant Edna Stangle's automobile being driven west on 94th Street in Chicago about 4:00 P.M., January 3, 1952. The automobile was struck by defendant Railroad's southbound passenger train, and plaintiff's decedent was injured. She died from a cause unrelated to this event.

We decided that a special interrogatory finding Edna Stangle guilty of wilful and wanton conduct was not against the manifest weight of the evidence. 19 Ill. App. 2d 278, 280. And that "there can be no reasonable inference to support a finding that though the Driver [Edna Stangle] was guilty of wilful and wanton conduct the Decedent was not equally guilty." Pg. 283. The first part of our decision is unaffected by the Supreme Court decision, 17 Ill. 2d at 479; the second part was reversed. That court decided the question of decedent's "freedom from contributory negligence and wilful and wanton misconduct was for the jury." 17 Ill. 2d at 485.

The Supreme Court opinion and our opinion eliminated all questions from the case except the questions of the negligence of the Railroad, the proximate cause of decedent's injury, and the instructions with respect to the liability of the driver.

Edna Stangle contends she was prejudiced by the giving of Instruction P-3 which described wilful and wanton negligence and concluded as follows:

... or the act of the said defendant was committed under circumstances exhibiting a reckless disregard for the safety of others, such as a failure, after knowledge of the impending danger, to exercise ordinary care to prevent it, or a failure to discover the danger through recklessness or carelessness when it could have been discovered by the exercise of ordinary care.

She claims this part of the instruction permitted a finding of wilful and wanton conduct upon a negligent failure to avert danger. There is no merit to this contention, for the language complained of meets the test set forth in *Schneiderman v. Interstate*

Transit Lines, Inc., 394 Ill. 569, 583; Brown v. Illinois Terminal Co., 319 Ill. 326, 331; Koch v. Lemmerman, 12 Ill. App. 2d 237, 241.

Complaint is also made of Peremptory Instruction P-7 in which the jury is advised, among other things, that the complaint charged Edna Stangle with wilfully and wantonly driving her "automobile at a high and dangerous rate of speed, having regard to the traffic and use of the way." We agree that there is no evidence of a "high and dangerous" rate of speed, but we note too that defendant made no motion to withdraw that allegation before the jury was instructed. The instruction, however, does state that defendant denied that charge. We think we should presume that the jury rendered its special finding on other charges of wilful and wanton conduct which are supported by the evidence. We are not persuaded that we must reverse the judgment for the giving of this instruction.

The Railroad contends there is no evidence of negligence on its part. In deciding this point we apply the familiar rule, taking only the testimony favorable to plaintiff, disregarding contrary and contradictory testimony, and drawing legal inferences in the light most favorable to plaintiff. Blue v. St. Clair Country Club, 7 Ill. 2d 359, 363.

No witnesses were offered by the Railroad. Its "signal maintainer", Ernest Rizzuto, was called by plaintiff.

There is evidence that when the automobile was into the intersection and onto the east or northbound rail, 13 feet from

the southbound rail, the train was one hundred feet north of 94th Street. This being so, the fireman, if not the engineer, ought to have seen the automobile in this position of danger at the time, if not earlier, and ought to have seen Rizzuto standing on the tracks. And the jury could infer, favorably to plaintiff, from the evidence that the train crew did nothing more to avoid the collision, than what had been done before she was in the place of danger, but "kept coming". Since the Railroad produced neither fireman or engineer, or any other witness, there is a presumption that the testimony of these men would not have been favorable to the Railroad. *Tepper v. Campo*, 398 Ill. 496.

We think that this was sufficient to take to the jury the question of proper lookout of the Railroad. We think too that Rizzuto's testimony that the train was traveling 30 miles per hour, having in mind the nature of the intersection and the buildings and shrubbery and trees at the four corners, was some evidence of unreasonable speed under the circumstances. We need only refer to the evidence favorable to plaintiff that the crossing bells were not ringing when the Stangle automobile was 75 feet east of the crossing even though the train must have passed the point at which the bells should start ringing; and to the testimony that Mrs. Stangle's first notice of the train was the noise of the Diesel engine.

The Railroad contends that Mrs. Stangle's wilful and wanton conduct was the "sole proximate cause" of the occurrence. It relies upon *Elliot v. Elgin, J. & E. Ry.*, 325 Ill. App. 161, where the court decided as a matter of law that the driver of an

automobile was the proximate cause of the occurrence. There the driver had an "unrestricted view of the train" for at least 87 feet. Here the exhibits and Mrs. Stangle's testimony, so far as favorable, tend to prove that "trees ... obstruct a motorist's view to the north until you get close to the tracks." We cannot say as a matter of law that Mrs. Stangle's misconduct was the sole proximate cause of plaintiff's injury.

The Railroad also relies upon *Stefan v. Elgin, J. & E. Ry.*, 2 Ill. App. 2d 300, where this court found that the failure of flasher signals was not the proximate cause of the occurrence because no train was in sight when Stefan drove onto the crossing and the automobile stalled when the train was 900 feet away. Those facts distinguish the case. Another case cited is *Johnson v. Chicago & N.W. Ry.*, 9 Ill. App. 2d 340, where a grandmother drove an automobile past an "operating wig-wag signal" at a familiar crossing in front of a "clearly visible oncoming freight train". The court affirmed the judgment in favor of the estate of the grandchild killed in the collision against the grandmother and affirmed judgment in favor of the Railroad. It refused to upset the finding that the conduct of the grandmother was the sole proximate cause of the injury. That case is also distinguished by its facts.

For all these reasons the judgment is affirmed.

AFFIRMED.

MURPHY AND BURMAN, JJ. CONCUR.

ABSTRACT ONLY.



47929

ABST.

In The Matter of The Petition of
JOHN E. WALTERS and CONSTANCE M.
WALTERS, his wife, to adopt BRUCE
EDWARD COLEMAN,

JOHN E. WALTERS and CONSTANCE M.
WALTERS,

Petitioners - Appellants,

v.

ELMA COLEMAN,

Defendant - Appellee,

RONALD M. COLEMAN,

Defendant - Appellant.

APPEAL FROM

COUNTY COURT

OF COOK COUNTY.

26 LA 2d 397

MR. JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

John E. Walters and Constance Walters appeal an order entered by the County Court of Cook County dismissing their petition in an adoption proceeding.

Elma Finn and Ronald M. Coleman were married on June 27, 1957, while Coleman was in the military service. A son was born to them on February 19, 1958, at their residence in South Lee, Massachusetts. The child was a premature baby weighing two pounds and five ounces and was in the hospital until May 4th, 1958. After receiving several letters from her brother who was then in service, asking that she take the baby, Mrs. Walters and her husband met the Colemans on a certain point on the Pennsylvania turnpike near Pittsburgh in June of 1958, where the child, in a clothes basket, was turned over to them. Mrs. Walters testified that they asked Mrs. Coleman if she knew what she was doing and told her that they would not take the baby without adopting him later. Two instruments were signed. One was entitled,

"Consent of the Mother" signed by Mrs. Coleman, but was not acknowledged, nor did it contain an affidavit by a person witnessing her signature as required by Sec. 3-6 of the Adoption Act. The other was a release and agreement signed by the Colemans relinquishing all rights and claims to the custody of their son ... consent to any court action. The Walters testified that Mrs. Coleman read the consent documents before she signed them.

Mrs. Coleman testified that her husband discussed putting their child in the care of his sister because she was a nurse and could give him good care. She said she understood this to be a temporary matter and when she signed the consents she was crying and nervous and was unable to read the documents and that no mention was made of adoption.

Mrs. Walters testified that during their July, 1958 visit in Massachusetts, when she mentioned they were going to change the name of the baby, Mrs. Coleman "grabbed" the boy and ran upstairs to a bedroom. That this was the only objection Mrs. Coleman made to their having the baby. She said Mrs. Coleman was not calm and fought to keep the child and that she too was hysterical. John Walters said that when he got up to the head of the stairs his brother-in-law Ronnie came out with the child and told him to take the boy and to "Get out of the house and never bring him back." Mrs. Coleman said that when they took the child her husband told her that she had no legal right to the child. In September she wrote to Mrs. Walters asking them to return the child.

On November 3, 1958, an attorney whom Mrs. Coleman had consulted in Massachusetts, wrote a letter to Mr. Walters, inquiring about the Walters attitude concerning the release of the child to the Colemans. That letter was answered by an attorney for the Walters stating they intended to file adoption proceedings. Shortly after Coleman got out of service, he and his wife, Elma, came to Illinois, on February 9, 1959, and consulted an attorney in an effort to get the child back. On February 11, 1959, a petition for adoption by the Walters was filed and the Colemans were served here with service.

The theory of petitioners case is that abandonment of the minor child by his mother, was clearly shown. That the finding of the trial court to a contrary effect is against the manifest weight of the evidence; that the consent to adoption Mrs. Coleman signed, even though not complying with the procedural requirements of the statute then in effect, constitutes persuasive evidence of abandonment.

In support of this contention petitioner cites ^{In re} Diana, 67 A. 2d 751, where the court held that the consent signed by the mother is an element to be weighed on the question whether she abandoned her child. The court said, "as evidence of consent we lay it to one side, and do not rest the decision on the document." There the mother clearly abandoned the child for fourteen months during which time she never visited the child and made no attempt to ascertain the persons in whose custody it had been placed, and the court observed, "there was not a line of

testimony that she did not fully comprehend the nature and character of the instrument she signed." In Commonwealth ex rel Piper v. Edberg, 31 Atl. 2d 84, the evidence of abandonment was clear and convincing. It was admitted that the import and seriousness of the agreement was fully explained by an attorney before consents were signed. In re Potter, 149 Pac. 23, a sixteen year old mother of an illegitimate child clearly abandoned her child for three years before she filed an objection to the adoption and then only after she was served with process.

The finding of the trial court that the defendant did not abandon her child is ~~not to be~~ disturbed unless it can be shown that such findings are clearly and manifestly against the weight of the evidence. Much weight must be given to the judgment of the court who saw and heard the witnesses since their credibility may be seriously affected by their appearance, manner and conduct while testifying. (Kelly v. Jones, 290 Ill. 375.) Where there is a conflict in the evidence concerning the material facts, the finding of the trial court is to be accorded the same weight as the verdict of a jury. Mayflower Sales v. Frazier, 325 Ill. App. 314. Kokan v. Costello, 347 Ill. App. 41.

Counsel for petitioner contends that the trial court erred in considering the confidential report of the Cook County Department of Welfare. He argues that since the court dismissed the petition for adoption there is a presumption that he considered matters detrimental to petitioners and cites Section 3-1 of the Adoption Act of 1945 (Ill. Rev. Stat. 1959, Vol. 1, Chapter 4,

Page 85), which provides for an investigation. It provides further that ... "such report shall be treated as confidential and withheld from inspection unless findings adverse to the petitioners, ... and in that event the court shall inform the petitioners of the relevant portions pertaining to said adverse findings.... In no event shall any facts set forth in the report be considered at the hearing of the proceeding, unless established by competent evidence." We do not not agree with counsel's contention as to presumption and in the absence of evidence to the contrary, we will assume the court has performed its duties in accordance with the law.

In the instant case we have a young mother who was working and supporting her family while her husband was in service. She was not in good health after the birth of the child and at the urging of her husband turned to her sister-in-law for help. The evidence is conflicting as to whether she read the consent documents in June before signing and whether under the circumstances she knew the real import intended by the consents. The evidence shows an active attempt by Mrs. Coleman to regain her child, even to the extent of employing an attorney, both in Massachusetts and Illinois. A few days before the filing of these proceedings, her husband joined her in employing an Illinois attorney, in an effort to regain their child. A short time later Coleman left his wife and both started divorce proceedings in Massachusetts. Coleman then went to Tinley Park, Illinois, to live with his sister and brother-in-law and signed a second

consent to the adoption.

We regret that it becomes necessary to forceably separate the child from loving care and parental affection and devotion shown to him by John and Constance Walters. We are however unable to say under the facts and circumstances in this case that the finding of the trial court is manifestly against the weight of the evidence. Finding no reversible error, the judgment of the County Court will be affirmed.

AFFIRMED.

KILEY, P.J. AND MURPHY, J. CONCUR.

ABSTRACT ONLY.

ABST.



47935

ADELINE GALATZER,
Plaintiff-Appellant,
v.
RICHARD SCHWARTZ,
Defendant-Appellee.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY

261A^{2d}398

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a personal injury suit in which the jury found for plaintiff and assessed damages at \$11,000. She has appealed from the judgment on the verdict.

The question is whether the trial was unfair to plaintiff resulting in what she claims is a "grossly inadequate" verdict and judgment.

We think the trial court committed reversible error in denying plaintiff's motion for a directed verdict of guilty at the close of all the evidence and in submitting to the jury the issues of plaintiff's contributory negligence and defendant's negligence proximately causing the injuries.

Taking the evidence most favorable to defendant and drawing the legal inferences most strongly in his favor, Nelson v. Stutz Chicago Factory Branch, Inc., 341 Ill. 387, 395, the trial court should not have found there was evidence that plaintiff was guilty of contributory negligence. Because she testified that she did not see defendant's car "ahead" of her, we cannot infer that she ought to have seen it. Defendant's

-2-

car was not ahead of her. He said he had begun his turn "either at the center or to the west of center of Sheridan Road before I started to turn south" and that "the turn had been completed when the car struck" the woman.

The same conclusion must be reached on the question of defendant's negligence proximately causing the injuries. The only legal inference drawable from his own testimony, about which there was no controversy, is that he was negligent in not seeing plaintiff on a bright afternoon in the cross-walk ten feet from the west curb until he was three feet from her.

There was no question for the jury on either of those issues and the jury should have been directed to find defendant guilty and to assess plaintiff's damages. The facts disclosed in the abstract decision of *Fitzgibbons v. Rue*, 342 Ill. App. 712 (Third District), distinguish that case. There is no evidence here that defendant had no opportunity to see plaintiff.

We think the error committed interfered with plaintiff's fair trial and could have affected the assessment of damages. We need consider no other question.

The judgment is reversed and the cause remanded with directions to find defendant alone guilty of the negligence proximately causing plaintiff's injuries and to submit the question of damages to the jury.

REVERSED AND REMANDED
WITH DIRECTIONS.

BURMAN and MURPHY, JJ., CONCUR.

ABTRACT ONLY.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
(Second Division)
MAY TERM, A.D. 1960

JERRY W. GROVES, a minor, by Rachel
Groves, his mother and next friend,

Plaintiffs-Appellees,

LOUIS GROVES,

Third Party Defendant-Appellee,

vs.

JOHN J. MOHAN,

Defendant-Appellant,
Third Party Complainant.

Appeal from
Circuit Court
of LaSalle
County.

261A-427

SPIVEY--J.

The plaintiff, Jerry W. Groves, a minor, filed a complaint at law in the Circuit Court of LaSalle County against John J. Mohan to recover five hundred dollars paid the defendant as a down payment on a written contract for the purchase of real estate. To this complaint the defendant filed an answer.

Defendant after obtaining leave of court filed what he styled a counterclaim and third party one count complaint, joining plaintiff's father, Louis Groves, as a third party defendant.

The court upon motion dismissed the counterclaim and third party. The order of dismissal stated inter alia "allows said motion, and the counterclaim and the third party complaint herein be, and they are hereby dismissed." The order of dismissal did not go on to dismiss the cause of action or enter any final judgment. From this order defendant and third party complainant appeals.

Standing alone an order dismissing a complaint is not final, and there can be no appeal unless a final order dismissing the action follows or unless the order dismissing the complaint adjudges that plaintiff take nothing by his action or uses words of equivalent meaning. Pollack v. Theiss, 348 Ill. App. 594, 109 N.E. 2d. 642; Lurie v. Dombroski, 7 Ill. App. 2d. 543, 129 N.E. 2d. 776; Kubala v. Dudlow, 17 Ill. App. 2d. 463, 150 N.E. 2d. 643.

The same rule applies to counter complaints. Gustafson v. Libertyville Motors, 4 Ill. App. 2d. 83, 123 N.E. 2d. 135.

We find an additional compelling reason for dismissing this appeal. This cause of action involves multiple parties and claims. There is pending at the time an undisposed of complaint and answer between the original plaintiff and defendant.

Section 50 (2) of the Civil Practice Act, Chap. 110, Sect. 50 (2), Ill. Rev. Stat. 1959, governs appeals from actions involving multiple claims or parties which provides,

"If multiple parties or multiple claims for relief are involved in an action, the court may enter a final order, judgment or decree as to one or more but fewer than all of the parties or claims only upon an express finding that there is no just reason for delaying enforcement or appeal. In the absence of that finding, any order, judgment or decree which adjudicates fewer

than all the claims or rights and liabilities of fewer than all the parties does not terminate the action, is not enforceable or appealable, and is subject to revision at any time before the entry of an order, judgment or decree adjudicating all the claims, rights and liabilities of all the parties."

Absent in this case is an express finding that there is no just reason for delaying enforcement or appeal.

Section 50 (2) of the Civil Practice Act applies to the dismissal of third party complaints even where final judgments have been entered. In re Hawthorn-Melody Farms Dairy, Inc., et al. v. Cuneo, 18 Ill. App. 2d. 154, 151 N.E. 2d. 393. To like effect, Behannon v. Joseph T. Eyerson and Sons, Inc. et al., 15 Ill. 2d. 470, 155 N.E. 2d. 585.

Appellant's Brief and Argument consisted of three pages, cited no authorities and the argument was all of six printed lines.

In re Estate of Schilling, 304 Ill. App. 187, 26 N.E. 2d. 188, in quoting from Kelley v. Kelley, 317 Ill. 104, it was said, "As was said by the court in Hooper v. Fox, 364 Ill. 613, 'if questions involved in a case are of sufficient importance to justify this court in deciding them they are worthy of the careful consideration of counsel presenting them. As we said in Kelley v. Kelley, 317 Ill. 104, 'It is the duty of attorneys practicing in this court to present to the court the authorities supporting their views and to assist the court in reaching a correct conclusion.'"

Appeal dismissed.

Crow P.J. and Wright J. Concur.

ABST.



48074

JOHN F. ENGLISH, etc., and
GEORGE MARCIE, etc.,

Appellants,

v.

DOMINIC ABATA, et al.,

Appellees.

) INTERLOCUTORY APPEAL

) FROM SUPERIOR COURT,

) COOK COUNTY.

) 261A^{2d} 428

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

Plaintiffs, an International Union and its Local affiliate, sue to permanently restrain a group of Chicago taxicab industry employees from using "Local 777" as part of the name of their newly formed unaffiliated Local Union. A motion for a temporary injunction was denied after the taking of evidence before a master in chancery. Plaintiffs appeal.

Plaintiffs' evidence before the master, in support of the motion for temporary injunction, is uncontroverted. Plaintiff Teamsters International was chartered many years ago and has a number of affiliated Local Unions. In 1937, it issued a charter of affiliation to a group of Chicago taxicab drivers, and the designated name for the Local Union was "Taxicab Drivers Union Local 777, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America." Since 1937, plaintiff "Local Union" has been commonly known in the Chicago area as "Local 777." Its 3,000 members are employed in the taxicab industry in Chicago.

In April, 1959, defendants, being dissatisfied with the administration of the International Union and the Local Union, associated themselves together in a local dissident group and formed a new Local Union. Dominic Abata, an ex-member of the affiliated Local Union, who had been its president for fifteen years, was elected president of the new Local Union; he chose for it the name of "Local 777 Democratic Union Organizing Committee." The new Local Union is not affiliated with any international labor organization and does not have any locals in any other areas of the country.

The new Union held a special meeting in Chicago on May 13, 1959. A notice of the meeting was distributed to the members of the plaintiff Local Union and was addressed to "Members of Local 777, I.B.T." The notice bore the name of "Local 777 Democratic Union Organizing Committee," as did a sign placed on the outside of the meeting hall. On May 22, 1959, the new union group filed representative proceedings before the National Labor Relations Board, and on May 26, 1959, the Secretary of State issued a certificate of registration, showing the new name and number as registered as a service mark, under the provisions of the Illinois Revised Statutes, 1957, Chapter 140.

The master reported that the names utilized by the two Local Unions were "singularly distinct enough so as not to constitute an appropriation of the plaintiffs' name," and "The numbers '777', while of themselves existing in the public domain,

have been employed in conjunction with the appellation 'Democratic Union Organizing Committee', or its initials, D.U.O.C., which, in itself, is sufficiently identifiable as being separate and apart from that designated name set forth in the plaintiff's by-laws and working rules." After reviewing the briefs of the parties that had been filed before the master, and having heard the arguments of counsel, the chancellor denied plaintiffs' motion for a temporary injunction.

The question presented is whether the chancellor abused his discretion in denying the motion for the issuance of a temporary injunction.

Plaintiffs contend that the assumption and use by the defendants of "Local 777" as part of the name of their new Local Union, for the purpose of competing as a rival labor organization, injures the business reputation of plaintiffs and dilutes the distinctive quality of the mark "Local 777," and its selection was to fraudulently mislead and confuse members of Teamsters Local 777 and the general public.

The granting or refusing of a temporary injunction rests largely in the discretion of the chancellor, should be issued with great caution, and only where the reason and necessity therefor are clearly established. The court must be guided by conclusions based on the law and facts disclosed by the particular case and is allowed a wide measure of discretion in granting or denying the relief prayed in the light of the facts.

(Simpkins v. Maras, 17 Ill. App. 2d 238 (1958).) A temporary injunction may be refused under circumstances where a permanent injunction might be granted. The court which is to exercise the discretion is the trial court and not the Appellate Court. 43 C.J.S. 425, 426.

The primary purpose of an appeal to the Appellate Court from an interlocutory order concerning an injunction is to permit a review of the exercise of the discretion lodged in the chancellor, and unless the Appellate Court finds that the chancellor's discretion has been abused, the interlocutory order will not be reversed or set aside. O'Brien v. Matual, 14 Ill. App. 2d 173, 186 (1957).

We have carefully examined the record, which shows an extensive hearing before a master in chancery, with full opportunity afforded plaintiffs to produce evidence. Both sides submitted written briefs to the master, which were reconsidered by the chancellor prior to his order denying the temporary injunction. We are not persuaded that the chancellor abused his discretion.

We have not discussed the other contentions or points argued, because we believe we have decided the only question necessary for determination at this posture of the case.

For the reasons stated, the order of the chancellor denying the motion for temporary injunction is affirmed.

AFFIRMED.

KILEY, P.J., AND BURMAN, J., CONCUR.

ABSTRACT ONLY.

47987

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. MARY MICELI,

Plaintiff - Appellee,

v.

THEODORE REMBOS,

Defendant - Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

26 LA. 429

MR. JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment order finding him to be the father of the child in a paternity case and directing him to contribute \$12.00 per week for the support of the child.

This proceeding was instituted in the Municipal Court of Chicago upon the verified complaint of Mary Miceli, filed on April 30, 1959, charging that Theodore Rembos was the father of her son. The defendant waived a trial by jury and the proceedings were heard by the trial court.

Mary Miceli met the defendant in 1952 when they were employed by the same company. She also did housework for defendant's wife for a two month period during 1953. During the months of January, February and March of 1958, she testified, she was unmarried and the defendant came to her apartment every other day and every night and they would have sexual relations as often as they were together. Defendant admitted he went to her apartment during those three months but said, "she would ask if he could come over and take her out for ice cream or a walk."

He denied ever having sexual relations with her. The complainant became pregnant and so advised the defendant, who drove her to his family doctor, but she alone saw the doctor and was examined by him. She gave birth to a son on November 18, 1958, and the birth certificate recited that the father was unknown, based upon her statement.

Theodore Rembos further denied complainant's statement that he was giving her five dollars a week for a while, but asserted he gave her five dollars once. He admitted to helping her get a \$550.00 loan and said his wife knew he co-signed the note. He related that complainant asked his wife if she was willing to let him stay with her week-ends and stay home the other five days, but he told her "that was out and that he could not help her anymore." Sophie Rembos, the defendant's wife, testified that the complainant came to her house in 1958 and asked her to leave her husband so she could marry him. She replied that "she had two children to think of first, plus, she didn't think her husband would do it." On cross-examination, she said she found out in 1958 that her husband had been going out with the complainant.

A paternity proceeding is a statutory proceeding, not a common-law proceeding. *Rawlings v. People*, 102 Ill. 475. While it has some of the forms of a criminal prosecution, as, for example, with respect to arrest and trial, it is nevertheless in its nature and effect a civil proceeding, the main

object being to compel the putative father to contribute to the support of his illegitimate child and to prevent the child from becoming a public charge. *Scharf v. People*, 134 Ill. 240.

The charge in this sort of case must be proved by a preponderance of the evidence. *People ex rel. Bondy v. Morey*, 315 Ill. App. 491, and we cannot say in the present case that plaintiff has failed to do this as a matter of law. Defendant seeks a reversal of the judgment principally on the ground that the complainant did not establish the paternity of the defendant by a preponderance of the evidence. In support of this contention he cites *McCue v. Flynn*, 327 Ill. App. 222; *Brady v. Chaffee*, 163 Ill. App. 242; *Northern Trust v. Parker*, 205 Ill. App. 450; *Sullivan v. Andrews*, 205 Ill. App. 590; *City of Mount Vernon v. Rainwater*, 245 Ill. App. 304, and *Carlton v. People*, 150 Ill. 181. None of these cases involve a paternity matter but generally hold to the proposition that the affirmative statement by one witness categorically denied by another witness of equal credibility without corroborating circumstances does not meet the requirement that plaintiff make out his case by a preponderance of evidence. The credibility and weight of the evidence in paternity cases is a question for the trial judge. *People ex rel. Harrison v. Siroky*, 343 Ill. App. 520. As the Harrison case points out, "the position of the trial court judge is especially suited ... to determination of the truth in the testimony." He has seen the witnesses and heard their testimony, and is qualified by experience to evaluate what he has seen and heard. We see no reason to substitute our judgment for his on a question of fact such as this.

Defendant also stresses the fact that the birth certificate lists the father as "unknown." A birth certificate is merely prima facie evidence of the facts it contains, Ill. Rev. Stat. Ch. 111 1/2 Sec. 55(1959). Like any other prima facie evidence, it can be rebutted, as it was in Long v. Long, 15 Ill. App. 2d 276.

Defendant complains that the \$12.00 per week payments are excessive. In examining the record we find a passing reference to the fact that plaintiff is presently employed and that defendant's wife had to leave her job on her doctor's advice, plus defendant's testimony that he has two children, earns \$90.00 per week, and "can't afford" payments of \$12.00 per week. Our statute requires that:

"...If such judgment is entered the court shall take evidence upon the requirements of the child for its support, maintenance, education and welfare...and shall enter an order thereof. The order may be directed to the father, or mother, or both...."

"In determining the amount of support and confinement expenses to be charged to the father, the court shall take into account not only his financial condition and circumstances but also the income and resources of the mother which are or may be available for the support of the child." Ill. Rev. Stat. Ch. 106 3/4 Sec. 59."

The evidence here falls far short of meeting these requirements. Therefore, we cannot now rule on defendant's contention that the award was excessive.

For the reasons stated above, the judgment of the Municipal Court is affirmed in part and reversed in part, and remanded for further proceedings under the statute to determine the proper amount of support for the child involved.

AFFIRMED IN PART; REVERSED
IN PART AND REMANDED WITH DIRECTIONS.

KILEY, P.J. AND MURPHY, J. CONCUR.
ABSTRACT ONLY.

ABST.



47979

RALPH J. SNYDER,

Plaintiff - Appellant,

v.

CONTINENTAL CASUALTY COMPANY,
an Illinois corporation,

Defendant - Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

26 10 30

MR. JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sues for reimbursement from a group policy of insurance for hospital, surgery, and miscellaneous expense. His motion for summary judgment was denied and defendant's motion for summary judgment was allowed. He has appealed.

Plaintiff contends the court erred in denying his motion and allowing defendant's motion for summary judgment. The question is whether the trial court properly decided the legal questions raised upon the pleadings consisting of plaintiff's statement of claim, the answer, a reply and answer to reply, a rejoinder by the plaintiff, interrogatories and the motions for summary judgment supported by affidavits. No claim is made that there are issues of fact.

Continental Casualty Company issued a group health and accident policy to Cline Manufacturing Company insuring its employees, and a certificate of insurance was given to Ralph G. Snyder, as one of the employees. Premiums were payable on the first of every month and were deducted from employees' salaries.

Both the master policy and the employees' certificates stated the coverage would immediately terminate if Cline failed to pay premiums when due, and further provided for immediate termination of an employee's coverage upon his leaving Cline's employment. Coverage could be extended, however, by paying the required premium, during temporary lay-offs for up to thirty-one days after the premium date next following the lay-off.

On April 1, 1958, Continental wrote Cline stating that the policy was terminated as of January 1, 1958, for its non-payment of premiums. On April 11, 1958, Snyder was temporarily laid off from work and on May 13, 1958, while still unemployed by Cline he was admitted to a hospital where he incurred the expenses sued for.

Plaintiff claims insurer waived strict performance of the policy provisions relating to payment of periodic premiums by accepting payments long after their respective dates. He refers us to the record which reveals that the last premiums were paid, as follows:

The Sept. 1, 1957 on Nov. 11, 1957
The Oct. 1, 1957 on Dec. 12, 1957
The Nov. 1, 1957 on Jan. 14, 1958
The Dec. 1, 1957 on Jan. 28, 1958

The general rule in contracts for insurance, as in other contracts, is that the provisions of the policy, and the certificate issued thereunder, govern the rights of the parties. (Lentin v. Continental Assur. Co., 412 Ill. 158; Moscov v. Mutual Life Ins., 387 Ill. 378). Acceptance of premiums by an insurance

company after their due date, may give rise to a waiver of prompt payment, or estop the insurer from declaring a forfeiture during the period in which an insured may expect his late premium to be accepted. *Mims v. Mutual Benefit Health and Accident Ass'n.*, 319 Ill. App. 239.

In this contention plaintiff cites *Tesk v. Sagerstrom*, 317 Ill. App. 231, and *Parker v. Railway Mail Mut. Ben. Ass'n.*, 328 Ill. App. 168. In holding against the insurer in the *Tesk* case the court said, "the insurer accepted premiums in violation of forfeiture provisions of the contract and then for the first time after death sought to avoid its liability." The circumstances in both of these cases were such that the courts found it inequitable to enforce a forfeiture. But Continental did not wait to exercise its rights of forfeiture until after Snyder's loss occurred.

The circumstances of this case do not warrant the application of the waiver rule. In the instant case, the premiums due defendant in January through May were never tendered or paid by either the plaintiff or his employer, in contrast to the facts in *Mims v. Mutual Benefit Health and Accident Ass'n.*, 319 Ill. App. 239. In the case at bar, plaintiff's claim is for a loss that occurred over four months after the failure to pay the last due premium. The certificate further provides:

"The insurance of the insured employee shall immediately terminate;

B. on the date the insured employee leaves or is dismissed from the employment of the employer, or is retired or pensioned...."

The affidavit of Gordon O. Williams, Plant Comptroller for Cline, states that Snyder last worked for Cline on April 11, 1958, and that the last deduction for premiums from Snyder's salary was made on March 16, 1958. Snyder therefore knew that he was no longer receiving pay checks from which deductions could be made for premium payments, and yet did nothing. The court could have found that he permitted the policy to lapse. Section VI of the certificate given plaintiff provided: "The group policy is in the possession of the employer and may be inspected by the insured employee at any time during business hours at the office of the employer." We must then assume that plaintiff was familiar with the terms of the group insurance policy and of his retained certificate.

Plaintiff also argues that the notice of termination on April 1, 1958, to be effective as of January 1, 1958, was of no effect by reason of the previous waivers. *Klim v. Johnson*, 16 Ill. App. 2d 484, and *Young v. Union Life Ins. Co.*, 202 Ill. App. 321, cited by plaintiff in support of this contention, concern a defense of misrepresentation in the application for policies and do not involve the cancellation of policies for the failure to pay premiums on the due date. Again in *Burnett v. Ill. Agric. Mutual*, 318 Ill. App. 629, the court held the notice by the insurer improper because it did not unequivocally inform the insured that it was its intention that the policy should cease after a given date, and in *James v. Metropolitan Life Ins. Co.*, 331 Ill. App. 285, the policy contained conflicting and inconsistent provisions.

Plaintiff further contends that he is entitled to notice of termination of the policy. The answer to this is found in the policy itself; it terminates upon non-payment of premiums, which he knew, and there is no requirement in the policy that the employees be notified. Both the policy and certificate plainly state that coverage is to cease upon termination of employment, temporary or otherwise. There is nothing in the record to indicate that Cline was obliged to maintain the insurance in force during the lay-off nor was any premium for May, 1958 deducted from plaintiff's paycheck or in any other manner tendered to Cline.

The rule of construction favoring assured must yield to the requirement of a reasonable construction, and affords no ground for disregarding the plain terms or conditions in the policy. *Milkes v. U.S. Fidelity and Guaranty Co.*, 257 Ill. App. 65.

Waivers of payment of premiums must relate to a reasonable time and the circumstances and in this case do not justify a finding of waiver by the insurer.

Some other questions have been raised by counsel, but in view of the foregoing conclusions we consider them immaterial.

JUDGMENT AFFIRMED.

KILEY, P.J. AND MURPHY, J. CONCUR.

ABSTRACT ONLY.

ABST.

CH. 100 L.A.
SEP 1960
ASSOCIATION

47969

EVELYN S. JONES,

Counterdefendant - Appellee,

v.

J. EDWARD JONES,

Counterplaintiff - Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

261A 484

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Evelyn S. Jones, plaintiff and counterdefendant, filed a complaint for divorce on the ground of cruelty against J. Edward Jones, defendant, who filed a countercomplaint charging desertion. ✓ Pursuant to a hearing by the chancellor, a decree was entered March 11, 1958 dismissing both the complaint and counterclaim for want of equity. Defendant took a direct appeal to the Supreme Court of Illinois on the theory that a freehold was involved, and plaintiff cross-appealed. The Supreme Court evidently rejected the theory that a freehold was involved and transferred the case to the Appellate Court without an opinion. ✓

We find no statement of facts in either of the briefs, but from the pleadings and abstract it appears that the parties were married on October 21, 1944 in Oak Park, Illinois. Two daughters, aged nine and seven at the time the complaint was filed on March 14, 1956, were born of the marriage, both of whom reside with plaintiff. In her complaint plaintiff sought alimony, custody of the two children, attorneys' fees, and other relief. Defendant claims a homestead right in a home in

River Forest which plaintiff had inherited from her mother, and dower rights with respect to other inherited properties alleged by defendant to have a value in excess of \$250,000.00. He also seeks custody of the two minor children whom he says he has not been permitted to visit since December 1958, as well as injunctive relief.

In his brief of 145 pages defendant sets forth twenty-five points, with innumerable subheadings, embracing twenty-five pages of his brief. In essence he contends that plaintiff failed to sustain her charges of cruelty as set out in her complaint and supplemental pleadings, and that he is in fact the injured party. The acts of cruelty charged occurred in 1955, 1956, and 1957. We cannot, within the reasonable confines of an opinion, discuss in detail the evidence relating to these charges, but after careful examination of the record we have reached the conclusion that the chancellor who heard the evidence properly dismissed ^{plaintiff's} ~~the~~ complaint for want of equity. Two of the charges are referred to as "sleep-walking incidents" and are alleged to have occurred in June and August of 1955. Plaintiff testified that in the middle of the night defendant carried her out of her room while using profane language, that she was afraid of falling down the stairs, and with difficulty "wiggled free" of him. On cross-examination she stated that she assumed that defendant was walking in his sleep. No hitting or beating is alleged or testified to.

Another incident occurred in August 1955. Plaintiff testified that for some time prior thereto defendant had sought to discuss matters of family finance with her, but that she refused to listen to him and put her hands over her ears when he insisted on talking. At the time of the second incident he came into the bedroom where she was sewing. When defendant told her she would have to listen he barred her exit from the room, and when she sought to turn the knob to open the door defendant put his weight on her hand, bruising it and pulling some ligaments in her arm. ✓

Another alleged act of cruelty occurred in October of 1955. Plaintiff had invited one Jennie Kilfether, unrelated to her and whom defendant had never met, to live at the family residence. Defendant objected to her presence in the household and brought forcible entry and detainer proceedings for her eviction. This was the subject matter of a prior suit decided here in 1956 (Jones v. Kilfether, 12 Ill. App.2d 390). Defendant contends and testified that this was one of the means employed to strain the marital relationship and induce him to move. He stated that plaintiff had often ordered him out of the premises, and had refused to prepare or serve his meals or attend to any of the household duties for him.

Another incident was alleged to have occurred on January 3, 1956. Plaintiff testified that she was attempting, against defendant's wishes, to bring an unopened Christmas box, about

twenty inches square in size and some twenty pounds in weight, into the bedroom; that as she entered the room "he forcibly pushed this box back" and hurt her. ✓

Another act of cruelty is alleged to have occurred on August 11, 1956, at dinnertime. There was a disagreement between plaintiff and defendant as to whether one of the children should be required to eat dinner with her father. The argument became so heated that both plaintiff and defendant wanted to call the police, and, with each one attempting to reach the telephone, plaintiff fell over a waste basket. She testified that defendant bumped into her and pushed her over the basket, and that she fell on the floor and was injured. ✓

The final incident is alleged to have occurred February 27, 1957. Plaintiff testified that while she was cleaning the living room defendant came in and insisted that she listen to him; that he stepped on a vacuum-cleaner cord and "yanked" it out of the socket; that she made an exit into the bathroom and closed the door, whereupon defendant forced it open and insisted that she listen to what he had to say. She replied that she would never tell him anything unless she was ordered to do so by the court, that she finally got out of the bathroom and went to the adjoining bedroom, where a "tussle" ensued, during which he struck her twice. On the court's questioning, she stated that, aside from putting his body in her way, there were no other blows struck; that although he struck her in the chest

"reasonably hard," she also struck him and pushed him away.

Since before Miss Kilfether was invited to live in the household, in 1955, over defendant's objections, the Joneses lived in a state of constant conflict. Defendant testified that after Miss Kilfether moved into the home plaintiff would no longer cook for him, or do any of his washing, mending or sewing; that she said she wanted only to get rid of him; that she told the children their father was "a big bully, . . . a dirty skunk; if he was any man he would leave the house and not bother us; he just likes to hear his voice when he reads to you; you don't have to do what he says and if he strikes you I will have him beat up, the big bully."

The chancellor was evidently of the opinion that the charges of cruelty were not of such a nature as to warrant a decree for divorce. We held in *Coolidge v. Coolidge*, 4 Ill. App. 2d 205, that extreme cruelty must consist of such physical acts of violence, bodily harm or suffering as endanger life or limb and show a state of present danger incompatible with the marital state; numerous cases are cited and discussed there in support of this interpretation of extreme cruelty. No such cruelty is shown here. It is apparent that plaintiff provoked many of the incidents heretofore related; that, within the context of the divorce law, they were trivial in nature; and that they did not constitute cruelty within the contemplation of the statute and the authorities construing it. ✓

At the close of the trial before the chancellor, defendant advised the court that he did not desire a decree of divorce, although his complaint asked such relief; rather, he was primarily concerned with custody of the children, his alleged property rights, and freedom from the annoyances which plaintiff had contrived in what he charges was a studied effort to get rid of him. In his brief and on oral argument here he reiterated his assertion that he does not want a divorce, and he objects primarily to the finding in the decree dismissing his complaint for want of equity because the finding would be res judicata and deprive him of other relief sought.

Affirmance of the decree denying plaintiff a divorce and of defendant's cross-complaint seeking a divorce--which he says he does not want--will leave the marital status of the parties as it was. However, such affirmance would be res judicata of any rights defendant may have to obtain custody of his children or to assert his property rights, and to obtain any other relief he may seek. Section 92 (1) (e) of the Civil Practice Act (Ill. Rev. Stat. 1959, ch. 110) provides that in all appeals the reviewing court may, in its discretion, and on such terms as it deems just, "give any judgment and make any order which ought to have been given or made, and make any other and further orders and grant any relief, including a remandment, a partial reversal, the order of a partial new trial, the entry of a remittitur, or the issuance of execution,

-7-

that the case may require." In order to preserve defendant's right to prosecute his prayer for relief other than divorce, and under the authority of this provision, and cases in Illinois interpreting it (see City of Aurora v. Y.M.C.A., 9 Ill.2d 286), we order that that part of the decree dismissing the cross-complaint for want of equity be reversed, and the cause remanded with directions that defendant be allowed to amend his cross-complaint, if he so elects, so as to delete his prayer for divorce but retain his prayer for custody of the children and other alleged rights, and that the cause then proceed to hearing on such amended cross-complaint.

DECREE AFFIRMED IN PART, REVERSED
IN PART, AND CAUSE REMANDED WITH
DIRECTIONS.

BURKE, P. J., and BRYANT, J., CONCUR.

ABST.



47942

GILBERT G. ROBINSON,
Plaintiff,

v.

M. L. JARVIS d/b/a MEL JARVIS CON-
STRUCTION COMPANY, WEBER FLOUR MILLS
COMPANY, a corporation; JOHN VANIER, et al.,
Defendants.

APPEAL FROM

CIRCUIT COURT

WEBER FLOUR MILLS COMPANY, ECONO-FLO
BULK FLOUR SERVICE, and JOHN VANIER,
Counter Plaintiffs Appellants,

COOK COUNTY

v.

M. L. JARVIS d/b/a MEL JARVIS CONSTRUCTION
COMPANY,
Counter Defendant Appellee.

26 14 485

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the trial court dismissing a counterclaim for indemnity filed by the owner of property, being sued pursuant to the Scaffold Act (Ill. Rev. Stat. 1957, Chap. 48, sec. 60, 69), against the contractor who was hired to do the work which resulted in the injury to the plaintiff.

The complaint was filed by Gilbert G. Robinson against Weber Flour Mills, Econo-Flo Bulk Flour Service, Inc. and John Vanier as servant of Weber Flour Mills in charge of and supervising the construction work being done on their behalf. M. L. Jarvis, d/b/a Mel Jarvis Construction Company, plaintiff's employer, was also included as a defendant, but

was dismissed because it was bound by the Workmen's Compensation Act, which prevents another action under the Scaffold Act. *Gannon v. Chicago, Milwaukee, St. Paul & Pacific R.R.*, 13 Ill.2d 460.

The other three defendants filed a counterclaim against Jarvis for indemnity. It alleged that plaintiff was injured while performing certain work for his employer, Jarvis, who was in charge of the work being done and that if there were any negligence in the case, it was attributable to Jarvis, and not to the counter plaintiffs. It asked that the counter plaintiffs be indemnified in the event that they were found liable to plaintiff.

Jarvis filed a motion to dismiss the counterclaim, which was granted. This appeal is from that order.

Appellee's contention is that the owner has no right to indemnity against the contractor who is engaged in the work. He contends that the Scaffold Act places an obligation upon the owner of the property which cannot be transferred to the contractor and that the only payment the contractor need make is the Workmen's Compensation award.

These contentions have been disposed of in the recent case of *Moroni v. Intrusion-Prepakt, Inc.*, 24 Ill. App.2d 534. We think that case is controlling. There the facts were essentially the same. The owner of the property had filed a counterclaim against the contractor for indemnification

in the event that it became liable to the plaintiff. The court held that it was error to **grant** the contractor's motion to dismiss the counterclaim, since the owner has a right to indemnity from the contractor. The court rested the right to indemnification upon the implied obligation of the contractor to perform the contract between it and the owner in a reasonably safe manner, which was allegedly breached. The rule forbidding contribution between joint tort-feasors was held not to be a bar to the right to indemnification because it has no application to a situation in which one party is an active wrongdoer and the other party is merely a passive or technical participant.

The case at bar is identical in its essential facts in that in each case the contractor was the counter defendant, subject to the Workmen's Compensation Act, and the counter plaintiff was the owner of the property. In each case, the trial court dismissed the counterclaim.

This case is controlled by the decision in the Moroni case, and therefore the judgment of the trial court dismissing the counterclaim is reversed, and the cause is remanded with directions to overrule Jarvis' motion to dismiss and for such other and further proceedings as are not inconsistent with the views herein expressed.

REVERSED AND REMANDED
WITH DIRECTIONS.

BURKE, P. J., TOOK NO PART.

FRIEND, J., CONCURS.

CR.
SEP 2 1930
ASSOCIATION

47877

FUNDED INVESTMENTS, INC.,

Appellant,

v.

LOUIS KOSARY, et al.,

Defendants-Appellees,

and

LOUIS KOSARY, et al.,

Third-Party Plaintiffs,
Appellees,

v.

TRANS-LITE INDUSTRIES, INC.,

Third-Party Defendant,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

261.1.436^{2d}

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Funded Investments, Inc., brought suit to foreclose a mechanic's lien, alleging an assignment for valuable consideration of a contract between Trans-Lite Industries, Inc., and Louis and Gertrude Kosary, upon which there was a balance due in the sum of \$7977.00. The contract provided for certain work to be done on four buildings owned by defendants; this action is still pending. During attempted settlement negotiations, the defendants, Louis and Gertrude Kosary, filed a third-party complaint against Trans-Lite Industries, Inc. Without serving a copy of notice on plaintiff, Funded Investments, Inc., the defendants were

successful in securing a default judgment against Trans-Lite Industries in the sum of \$4647.50, with costs taxed against Trans-Lite. Thereafter, plaintiff, Funded Investments, Inc., and the third-party defendant, Trans-Lite, filed petitions to vacate and set aside the judgment. Pursuant to a hearing, the court denied the motions and petitions to vacate and set aside the judgment. This appeal followed.

In the course of oral argument here, attention was called to the fact that the judgment from which this appeal is taken did not include "an express finding" by the court "that there is no just reason for delaying enforcement or appeal," and counsel argued that without such finding a court of review lacks jurisdiction to entertain an appeal where multiple parties or multiple issues are involved. Thereupon, counsel for Trans-Lite Industries asked leave to file suggestions as to this question, but none have been filed.

Section 50 (2) of the Civil Practice Act (Ill. Rev. Stat. 1959, ch. 110) reads as follows:

If multiple parties or multiple claims for relief are involved in an action, the court may enter a final order, judgment or decree as to one or more but fewer than all of the parties or claims only upon an express finding that there is no just reason for delaying enforcement or appeal. In the absence of that finding, any order, judgment or decree which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not terminate the action, is not enforceable or appealable, and is subject to revision at any time before the entry of an order, judgment or decree adjudicating all the claims, rights and liabilities of all the parties.

This provision contains much of the language of Federal Rule 54(b) and covers judgments involving fewer than all of the parties as well as fewer than all of the claims. As pointed out in the Comments in Smith-Hurd Annotated Statutes, the purpose of the provision was to do away with undesirable piecemeal appeals; the effect of the required procedure is that it avoids unnecessary appeals, yet permits an appeal to be taken before final disposition of the case where the court considers an immediate appeal to be appropriate, and it enables litigants to determine with certainty when an adjudication affecting fewer than all of the matters or parties involved is appealable; see *Dickinson v. Petroleum Corp.*, 338 U.S. 507 (at p. 512), and *Colonial Airlines v. Janas*, 202 F.2d 914 (2d Cir.)(at p. 917). Applicable decisions of this State have held that unless the decision appealed from contains an express finding--or an unequivocal implication--that the judgment is final, the reviewing court has no jurisdiction, and the appeal will be dismissed; *Ariola v. Nigro*, 13 Ill.2d 200; *Veach v. Great Atlantic & Pacific Tea Co.*, 22 Ill. App.2d 179; *Bieschke v. Schwitzenberg*, 21 Ill. App.2d 575 (Abst.); and *Hawthorn-Mellody, etc. v. Elgin, J. & E. Ry.*, 18 Ill. App.2d 154.

Accordingly, we are impelled to dismiss the appeal, and it is so ordered.

APPEAL DISMISSED.

BURKE, P.J., and BRYANT, J., CONCUR.

47924

JOHN VIROSTKO,

Plaintiff-Appellee,

v.

KINNARE CORPORATION, SPRINKLER
CONTRACTORS, INC., and BONGI
CARTAGE COMPANY., INC.,

Defendants,

On Appeal of SPRINKLER CONTRACTORS,
INC.,

Defendant-Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Sprinkler Contractors, Inc. appeals from a judgment for \$15,000 rendered against it and two other defendants. Post-trial motions were denied. The other defendants received covenants not to sue and are not interested in this appeal.

Plaintiff, who was 80 years old at the time of the occurrence and 82 years of age at the time of the trial, was working as a part time night watchman at the Wilson-Jones Plant. On February 28, 1957, he reported for the 4 P.M. to midnight shift. His duties were to make the rounds and punch the clock. He fell into a trench which had been excavated on the grounds of his employer, suffering injuries. Appellant maintains that it owed no duty to plaintiff with respect to the excavation, and that it should have a judgment notwithstanding the verdict. There was evidence that the foreman of appellant told the Bongi Cartage Company, the excavation contractor, how to dig the trench. It was dug for the performance of appellant's work.



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Appellant's men worked in the trench prior to and after the time of the occurrence. The trench created a dangerous condition and appellant was aware of that condition. The trench was not protected in any way, and at the time of the occurrence appellant had control of it. As there was evidence that appellant had a duty to barricade the trench and failed in that duty, and that as a result plaintiff was injured, defendant's motion for judgment notwithstanding the verdict was properly denied. As the record contains substantial evidence supporting the elements of plaintiff's case, we also reject defendant's alternative motion for a new trial on the ground that the verdict is against the manifest weight of the evidence.

Defendant asserts that the court erred in refusing to give four instructions, Nos. 1, 2, 5 and 7, all embodying its theory of the case, that is, that in the event the jury believed from the evidence that this defendant under its contract had no duties to do the excavating or to barricade or otherwise protect the trench, the defendant should be found not guilty. There was no evidence that the trench was dug on behalf of the Bongi Cartage Company. There was no privity of contract between plaintiff and defendant. There is evidence imposing on the defendant the duty to take protective measures. We think that defendant's proffered instructions would tend to confuse the jury and were properly refused. Defendant urges that the error in refusing to give three instructions on its theory of the case was compounded to its prejudice by the action of the court in giving four peremptory

instructions for the plaintiff which suggested or commanded a guilty verdict without reference to the question of duty or control over the excavation work. The instructions complained of are plaintiff's instructions Nos. 3, 5, 18 and 19.

Plaintiff's instruction No. 3 told the jury that if they believed from a preponderance of the evidence and under the instructions of the court that the accident was due to the joint negligence of all of the defendants, and that as a direct and proximate result of the joint negligence of all the defendants, if they believed they were negligent and plaintiff was in the exercise of ordinary care for his own safety, then they could find all the defendants guilty, and if they found from such preponderance of the evidence that all of the defendants were guilty of the negligence charged, then it would be no defense for one of the defendants to show that the other defendant was guilty of negligence or guilty of a greater degree of negligence. There was substantial evidence for the jury of the negligence of defendant, and it was not error to tell the jury that it would be no defense to this defendant or any of the other defendants, to show that another defendant was also guilty of negligence. *Storen v. City of Chicago*, 373 Ill. 530; *Village of Carterville v. Cook*, 129 Ill. 152; *Libby v. Town Club*, 5 Ill. App. 2d 559. For the same reasons the court did not err in giving plaintiff's instruction No. 5.

Defendant states that plaintiff's instruction No. 18 purports to summarize the issues without referring to any issue of control over the excavation or contract duty in connection therewith. Defendant's liability does not rest upon a contract. We find no error in the giving of this instruction. Defendant charges that plaintiff's instruction No. 19 is a factual instruction telling the jury that if the defendants or one or more of them failed to provide any barricade, light or warning of any kind for the trench, that they should find for the plaintiff and against such defendant or defendants. We are satisfied that this instruction, considered with all the other instructions given to the jury, correctly states the law. It is not plaintiff's contention that the trench was dug in an unworkmanlike manner. The defendant was charged with negligence in that it failed to provide barricades. Defendant says that the effect on the jury of the alleged erroneous instructions was rendered more prejudicial by the giving of plaintiff's instruction No. 6, which defines negligence and proximate cause in general terms only as applicable to any person without reference to whether or not that person had any control, responsibility or duty in connection with the excavation. An examination of the instruction discloses that it correctly defines proximate cause. The court did not err in giving this instruction.

Mary Alice Kinnare, called as a witness for plaintiff under Section 60 of the Civil Practice Act, in answer to the question, "Who was to supervise the digging of the trench?", replied:

"The Sprinkler Contractors." Miss Kinnare used a record to refresh her recollection as to the progress of the work. As secretary of the defendant she was in a position to know who was to supervize the digging of the trench. There was no error in permitting the answer.

Finally, defendant insists that the verdict was the result of passion, prejudice and caprice as evidenced by its excessive size in view of the evidence, and was brought about in whole or in part by improper, inflammatory and prejudicial remarks on the part of counsel for plaintiff. The jury had evidence as to the age of plaintiff, his injuries and his work record. Under the evidence the \$15,000 verdict was not excessive. We do not think that plaintiff's closing argument to the jury deprived defendant of a fair trial.

For the reasons stated the judgment is affirmed.

JUDGMENT AFFIRMED.

BRYANT, P. J., and FRIEND, J., CONCUR.

ACST.



47894

GOULD COAL COMPANY, an Illinois Corporation,

Appellee,

v.

EXCELSIOR BREWING COMPANY, an Illinois Corporation,

Appellant,

and

HORACE L. P. BRAND and CHICAGO TITLE AND TRUST COMPANY, a Corporation, as Trustee under Trust Deed recorded as Document No. 13379101,

Defendants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

26 I.A. 488^{2d}

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The plaintiff, Gould Coal Company, filed a complaint for partition of real estate or, as an alternative, for sale of premises and liquidation of a mortgage note, with division of the net proceeds among the rightful owners. The property was sold, and the matter of accounting was referred to a master in chancery, who filed a report recommending findings in favor of plaintiff. All of defendants' exceptions to the report were overruled, and a decree entered, from which this appeal is taken. It is urged on behalf of the sole appealing defendant, Excelsior Brewing Company, that major portions of the decree of accounting are contrary to the manifest weight of the evidence and contrary to law; that defendants' exceptions to the report

should have been sustained; and that the decree of accounting should have been modified accordingly.

Before entering the decree, the chancellor wrote a lengthy opinion consisting of some sixteen pages in which he set forth facts considered by him to be essential for a determination of the controverted issues involved. Plaintiff adopted the chancellor's statement of facts and incorporated his opinion in full in its brief. Defendant, on the other hand, contends that the chancellor's findings were inadequate and, in some respects, incorrect. Accordingly, it becomes necessary to examine the facts upon which the accounting is based, and to set out the historical background of the relationship of the parties and the events occurring prior to the filing of the complaint which are not alluded to in the chancellor's opinion; these are essential for an understanding and a determination of some of the controverted questions presented.

It appears that in 1944 the property here in question, an irregularly shaped area, was part of a larger tract located at Elston Avenue, North Leavitt Street, and the Chicago and North Western Railway Company right-of-way in Chicago. Excelsior Brewing Company, hereinafter referred to as defendant, owned an undivided 325/900ths interest in the property, Armin W. Brand a 475/900th interest, and Phillip R. Brand a 100/900th interest. Improvements on the land consisted of a stock house (Parcel No. 1), a brew house (Parcel No. 2), an office building (Parcel No. 3), and a coal yard (Parcel No. 4).

In 1944 a tax foreclosure suit was filed which involved all the Brand property. William J. McGah of Chicago was retained as attorney to represent the Brands, as well as the defendant corporation, of which Horace Brand was the sole shareholder. This was the first time that Horace Brand had met McGah. He then told McGah that defendant had no funds with which to pay its share of the foreclosure taxes and the expenses, whereupon McGah stated that he was ready to raise the money if the corporation could not do so; he estimated that \$21,500.00 would be needed for defendant's share. McGah made the loan of this amount from his personal funds, although Horace Brand was not aware of this fact at the time. When the loan was made, defendant did not receive any part of it in cash. Horace Brand requested that McGah pay to defendant any balance not used in the foreclosure settlement, but this was not done. Horace Brand testified that he was under the impression that the unused balance of the loan would be applied on the mortgage note. The total expenses of the tax foreclosure, including an \$8000.00 fee to McGah's law firm, were \$51,217.06, and defendant's 325/900ths share was \$18,495.05, leaving \$3004.95 of the loan to defendant unused in the foreclosure itself. McGah did not have any records going back to 1944 showing when the settlement money was actually paid. He testified that the 1941, 1942, and 1943 taxes were past due and had to be paid. Expenditures on behalf of defendant, according to McGah, aggregated \$49,445.86, of which defendant's 325/900ths portion was \$17,869.94; there was also a

325/900ths share of the \$8000.00 fee paid to the law firm of Whitty and McGah, which resulted in a legal charge to defendant of \$2888.00; the total amount of defendant's share of the expense was thus \$20,757.94.

A one-year bearer note, dated October 11, 1944, was given for the loan secured by trust deed conveying an undivided 325/900ths interest in the real estate to the Chicago Title and Trust Company as trustee, providing for interest at four per cent per annum, payable semiannually. A chattel mortgage was also made on machinery and equipment which was subsequently sold. As additional security defendant gave a rent assignment to McGah, including authority to collect rents and to lease the property, the proceeds to be used to pay real-estate taxes, to be applied on the note, and to pay expenses of the management and care of the property. Armin Brand and Phillip Brand also gave McGah authority to collect their share of the rents for them. On October 13, 1944, two days after the date of the note, the trust deed, and the rent assignment, McGah wrote to Horace Brand acknowledging that, in the event Armin Brand and Phillip Brand revoked their authority given to McGah to collect their share of rents from the property in question, the assignment of rents from defendant would become null and void. This arrangement was also confirmed in a letter from Horace Brand to Armin Brand dated January 13, 1945. The authority from Armin and Phillip Brand to McGah to collect their share of the rents was oral. Both Armin and Phillip Brand died in 1946. McGah's law firm handled the probate of both estates.

Horace Brand challenged the authority of McGah to collect rents in defendant's behalf after the death of Armin and Phillip Brand in 1946 on the ground that the authority given on the rent assignment had terminated under the agreement with McGah, and, on numerous occasions after the death of Armin Brand, Horace Brand protested against McGah's collecting rent, negotiating leases, paying taxes, and otherwise acting as defendant's attorney. McGah, however, continued to collect rents and to manage the property until April 30, 1951. During that month he sold the mortgage note to plaintiff and thereafter represented plaintiff as its attorney. Payments on the mortgage note were made by defendant only with proceeds from rent collected and from sale of portions of the property in question. Rents were deposited in the bank account of Whitty and McGah, and proceeds from sales were deposited in McGah's personal account. The total amount of defendant's share of rent receipts retained by McGah and applied to defendant's note to December 31, 1950 was \$3940.32. Defendant's share of proceeds from sale of portions of the real estate, the machinery, and the equipment to December 31, 1950 and applied by McGah to defendant's debt was \$20,365.06.

The one-year mortgage note was not paid when due on October 11, 1945, and a foreclosure suit was filed by McGah. On October 12, 1948 defendant and McGah agreed to a one-year extension to October 12, 1949, with interest fixed at seven per cent from October 11, 1945 to October 12, 1948, and on the balance unpaid

at four per cent from October 12, 1948 to October 12, 1949. Defendant also agreed to pay \$25.00 court costs and \$250.00 to McGah as attorney's fees. The mortgage note again became overdue on October 12, 1949, and on May 15, 1951 was sold to plaintiff for \$7,376.44.

After Armin Brand's death in 1946 McGah sent written statements to Horace Brand, at intervals, showing receipts and disbursements. Defendant objected to these statements, both orally and in writing, and also to McGah's charging management fees after the death of Armin Brand. In response to these objections McGah sent defendant letters from time to time indicating the balance due on the mortgage debt which, in defendant's interpretation, contained numerous errors and did not state the balances correctly. The accounts of the parties were never reconciled. According to McGah, the balance due on the note as of December 31, 1950 was \$8,176.01, and as of February 12, 1951 the balance was \$7,245.44.

As heretofore stated, portions of the property were sold from time to time. On September 15, 1947 defendant was given credit for \$5,416.67 from the sale of fixtures. On November 12, 1948 it was credited with \$5012.97 from the sale of one of the parcels of real estate. Defendant received additional credits for its share of the proceeds from sale of other portions of the property in the aggregate sum of \$10,050.62.

Francis A. Regan, a certified public accountant, was retained by defendant to examine McGah's books and records relating to management of the property and the application of credits to the mortgage indebtedness. He prepared an analysis of these records for the period from the date of the mortgage note, October 11, 1944, to December 31, 1950, and, according to his computation, there was a credit balance of \$1019.21 in favor of defendant on December 31, 1950, in contrast to a deficit balance of \$8176.01 according to McGah's figures. Defendant contends that the difference arises from treatment of unused proceeds of the mortgage note, amounting to \$3004.95, management fees of \$1129.88, legal fees totaling \$857.45, cash on hand on December 31, 1950 in the amount of \$1272.80, as well as a difference in the method of computing interest. According to Regan's analysis, the amount of \$3004.95 represents the balance of the original note, for which he found no support covering the disbursement. By deducting the \$3004.95 from the face amount of the note, Regan arrived at what he called a net original indebtedness of \$18,495.05. This resulted in an adjustment of interest to the extent of \$1170.98. He found from the McGah report of receipts and disbursements that management fees and legal fees had been deducted from receipts in the amount of \$5504.56. These items are set out in Schedule 2 of the Regan analysis and are segregated as items in controversy. In computing interest Regan

used the same rates as found in plaintiff's Exhibit 6, which were four per cent for the original one-year term of the note, October 11, 1944 to October 10, 1945, and for the one year of extension, October 11, 1948 to October 10, 1949, and seven per cent for all other years. Regan applied the proceeds from rent or from the sale of assets to the indebtedness as the funds were received by McGah, first to interest and then to principal. The funds were not segregated when received by McGah's office and were placed in the general office bank account, and Regan made his computation by applying the receipts to the indebtedness as of the end of the month received. Surplus funds from rent and sales receipts were accumulated by McGah. He did not credit defendant with any interest on these funds, nor did he offer to turn defendant's share of the funds over to it. His position was that defendant had no right to these funds until taxes were paid. He based his right to hold the funds on the rent assignment. The amount of surplus funds held by McGah varied from time to time. Representative balances ranged from \$2700.00 to \$6271.86.

Regan computed tax payments by McGah as having been made from rent receipts. He made no allowance for building up a tax reserve but made a deduction when McGah made tax payments. In his computation Regan gave credit for payment of taxes on the date paid. Taxes were taken out, but not in advance. The difference in interest computation as between Regan's analysis and plaintiff's statement

of account, as of December 31, 1950, was \$2930.14. After that date rent was collected from plaintiff at the rate of \$350.00 per month from January through April of 1951, when plaintiff's lease expired.

After April 30, 1951 no rent was paid by plaintiff for the use and occupation of the property. In the court order of January 29, 1954 referring the cause to the master, it was specified, among other things, that a determination should be made as to what amount, if any, should be due to defendant on account of such use and occupancy of the premises by plaintiff.

Defendant challenges several items in the master's report and in the decree. It is first urged that the chancellor erred in his finding as to the rental value of the real estate occupied by plaintiff, and that defendant's exceptions with respect to this finding should have been sustained. The specific question arises whether there was sufficient evidence to support the finding that \$350.00 per month was a fair and reasonable rental for the property from May 1951 to August 1956. It appears from the evidence that, for the purpose of fixing a fair rental value for the period running from May 1, 1951 to December 31, 1955, Harry Shlaes, a real-estate broker and appraiser, examined the property at the request of counsel for defendant, and for the same purpose George W. McLester, also a real-estate broker and appraiser, examined it at the request of Lee Gould, president of the plaintiff corporation. McLester, at the request of Gould, obtained the services

of a third appraiser, Paul Altemeier. The three appraisers, whose qualifications were not challenged, made a written report that \$8100.00 per annum, or \$675.00 per month, was the fair rental value.

Their appraisal was repudiated by plaintiff who subsequently retained new appraisers, William H. Brinkman and H. O. Lane. Brinkman's opinion of the rental value was \$4200.00 per year, or \$350.00 per month; he considered the average fair market value of the property during that period as being \$60,000.00. He also considered as a factor in his appraisal that the demand for coal yards was going down over the past few years--coal yards were dying out in the Chicago area. Brinkman testified that ninety-five per cent of the coal yards in Chicago were owned by railroads, and that one of the elements considered by such an owner in determining rental charges to tenants in the yard was the amount of freight tonnage the railroad expected to realize from the coal yard. However, Brinkman, knowing that the coal yard in question was owned by individuals and not by a railroad, did not take that important factor into consideration. Lane, who testified that he and Brinkman made the appraisal together, arrived at the same figures as Brinkman as^{to} the fair rental value and sale value of the property. He too was of the opinion that the coal business was not good, that many coal yards were for sale, that a large number of them were owned by railroads, and that they were anxious to rent them for almost anything they could get. Lane admitted that he did not compare the rental figure he placed on the property with rentals

of any other coal yards then in operation. This, defendant contends, made Lane's opinion purely speculative.

There is another and significant factor which casts doubt upon the value of the appraised rental figure of \$350.00. On August 22, 1956 this property was bought at public sale for \$107,500.00; plaintiff was the high bidder at that figure, and the master sold the property to plaintiff for that amount. Obviously the sale value was utterly disregarded by the last appraisers (they made their appraisal following the sale), as well as by the master and the chancellor, in fixing the monthly rental figure at \$350.00. The master found the fair and reasonable rental value of the property, from May 1, 1951 to August 22, 1956, the date of sale to plaintiff, to be \$350.00 per month, and the final decree entered June 30, 1959, made a similar finding..

The authorities in this State are in accord in holding that the price actually paid at a bona fide sale for property, the value of which is in issue, is admissible in evidence to prove the value of such property, and in the absence of other testimony such proof is sufficient evidence of its value (Johnson v. Canfield-Swigart Co., 292 Ill. 101); that actual sales are the best evidence of value (City of Chicago v. Lehmann, 262 Ill. 468); and that where there are no actual sales of similar land in the vicinity at about the same time, evidence of bona fide offers may be admitted (Sanitary District v. Boening, 267 Ill. 118). In McKeown Bros. Co. v. Ogden Kennel Club, 269 Ill. App. 622, the court held that what one

pays for anything at a fair sale, there being no suspicious circumstances, is prima facie evidence of its value. Plaintiff's willingness to pay \$107,500.00 for the property should have been considered by the master and the chancellor as prima facie evidence of its value; certainly there could be no stronger indication of its value to plaintiff since plaintiff itself purchased it at this price. The significance of this evaluation could not be brushed aside by the opinion testimony of two of the appraisers who evidently did not take all the material circumstances into consideration in arriving at a rental value of the premises. Both Brinkman and Lane fixed the sale value of the property at \$60,000.00. If the conditions with respect to the demand for coal yards were as unpromising as they stated, it is difficult to understand plaintiff's willingness to pay \$107,500.00 for the property; and if the relationship of the rental value of Brinkman and Lane to the sale value of \$60,000.00 is applied to the actual price of \$107,500.00 paid by plaintiff, the rental value would be close to the assessed rental value of \$675.00 shown by the original appraisal. In the circumstances we conclude that the finding of the chancellor that \$350.00 was a fair rental value of the property is contrary to the manifest weight of the evidence; accordingly, that portion of the decree is reversed and the cause remanded with directions to restate the accounting between the parties.

It is next urged by defendant that the accounting between the parties as to the balance due on the mortgage note purchased

by plaintiff is directly affected by charges made by McGah for managing the property and for acting as defendant's attorney in preparing leases and making sales. It is conceded that in October 1944, at the time McGah made the mortgage loan to defendant, an assignment of rents was given to him by defendant, with authority to collect the rents, lease the property, pay real estate taxes from funds collected, and apply defendant's share of the proceeds to the mortgage note. However, the agreement between defendant and McGah contained the qualification that, should Armin and Phillip Brand revoke their authority, the assignment of rents from defendant would become null and void. McGah denied this, but at the hearing before the master it was shown by documentary evidence that McGah acknowledged this limitation, under date of October 13, 1944, in a letter to Horace Brand in which he stated that "in the event that Armin Brand and Phillip Brand revoke the authority given to me to collect their share of the rents on the property described in said assignment of rents, then said assignment . . . shall also become null and void." McGah admitted his signature to this letter, and it was received in evidence without objection. He also admitted that his authority to collect and hold funds in defendant's behalf was based on the rent assignment. The question therefore arises whether McGah's right to manage defendant's interest in the property, collect funds and charge defendant fees was in effect until McGah relinquished management in April 1951 or whether this authority became null and void at an earlier date by virtue of the agreement

of October 13, 1944. Both Armin and Phillip Brand died in 1946. It is urged that their death ended McGah's authority just as effectively as if the Brands had revoked it during their lifetime. In the early case of Dinsmoor v. Bressler, 164 Ill. 211, the court had to pass upon the capacity in which certain attorneys had collected money and said (p.220):

If they rightfully collected it while "acting as attorneys for the estate," they must have been employed for that purpose by the estate, that is to say, by its lawful representative, the administrator. They could not have been rightfully "acting as attorneys for the estate" in pursuance of any previous employment by the deceased in his lifetime, because the authority of an attorney to collect for a client is revoked by the death of the client, and he has no authority to proceed further without a new retainer by the personal representative of the client. . . .

The general rule is that "the death of the principal terminates the authority of the agent." (Restatement, Agency, Vol. I, § 120 (1933).) See also Trubey v. Pease, 240 Ill. 513, and Lancaster v. Springer, 239 Ill. 472. After Armin Brand's death in 1946, Horace Brand, on behalf of defendant, made numerous protests with reference to McGah's collecting rents, negotiating leases, paying taxes, and otherwise acting as defendant's attorney, but McGah evidently ignored these objections. In the circumstances, we think it was error for the chancellor to honor in the accounting between the parties any management fees charged by McGah for services after April 1946, and that portion of the decree is reversed and the cause remanded with instructions that the accounts between the parties be restated by giving effect to the termination of McGah's authority to charge fees for the management of defendant's interest in the

property after that date.

It is next urged that an erroneous method of accounting was used in computing defendant's indebtedness; that instead of applying defendant's share of receipts to its debt as the funds were collected, thus reducing interest charges from time to time, McGah permitted the collected funds to accumulate until the balances reached as high as \$8546.68 for all the owners. As heretofore stated, rent money was deposited in the Whitty and McGah bank account and the sales proceeds were deposited in McGah's personal account. No interest was credited to defendant on its share of funds held by McGah, while at the same time McGah was charging defendant interest on the mortgage debt; indeed he was charging compound interest, and it was not until five days before the final decree was entered that McGah filed an acknowledgment with the trial court that such unlawful interest had been charged. The law in this State governing procedure to be used in application of interest and principal payments in a case of this kind is clear and generally followed in the great majority of other states. In *Scales v. McMahon*, 364 Ill. 413, which was an accounting suit covering numerous transactions between debtor and creditor, objection was made to the method of accounting. The court, after sustaining the objection, adopted the rule laid down by the United States Supreme Court in *Story v. Livingston*, 13 Pet. 359, ^{38 U.S. 359,} 10 L. Ed. 200 (page 420 of the *Scales* opinion):

"The correct rule as to interest is, that the creditor shall calculate interest, whenever a payment is made. To this extent the payment is first to be applied, and if it exceed the interest due, the balance is to be applied to diminish the principal. This rule is equally applicable, whether the debt be one which expressly draws interest, or on which interest is given as damages." . . .

The same rule was enunciated in *Cohen v. City of Chicago*, 377 Ill. 221, and in *In re Estate of Cunningham*, 311 Ill. 311. Regan followed this rule in his computation of interest, and the master and chancellor should have complied with it. The difference in interest computation between Regan's analysis and plaintiff's statement of account which was followed by the chancellor is \$2930.14, which would be diminished by virtue of the amended statement of account filed by plaintiff to eliminate compound interest. We hold that the final account submitted by McGah was not computed in accordance with the established law of Illinois, and the decree of the trial court should therefore be reversed as to this aspect of the case, with remandment ^{of the cause} to the trial court to restate the accounts of the parties accordingly.

McGah performed in many capacities during the period from October 1944 to the date when the final decree was entered. He was originally retained by defendant and also by Armin and Phillip Brand to represent them in the tax foreclosure case. His fee for that service was \$8000.00, and that amount is not in question here. He also became a creditor of defendant because he personally made the mortgage loan in the amount of \$21,500.00. At the same time he

became the agent of defendant under the rent assignment to collect the rent, lease the property, pay taxes, and apply defendant's share of the proceeds to the mortgage note. Management fees were to be paid him on the basis of five per cent of all rents collected. Defendant does not question the validity of such charges during the period when the rent assignment was in effect--through April 1946. McGah had a right to be paid interest on the mortgage debt; that is not disputed. As attorney for defendant he was bound to see that his client's debt was reduced as rapidly as funds were received and in accordance with the terms of the mortgage note. However, where an attorney becomes involved in business transactions with clients and assumes responsibilities of acting in various capacities at the same time, it is incumbent upon him to show to the satisfaction of the court that his dealings with his clients were fair, especially where he receives money and exercises his own discretion as to where and when that money will be applied to his clients' debts. The rule with respect to situations of this kind is clearly set forth in numerous Illinois cases; see *Cassem v. Heustis*, 201 Ill. 208, wherein the court (p. 232) adopted the view of the attorney-client relation as set forth in *Elmore v. Johnson*, 143 Ill. 513, that "'the law watches with unusual jealousy over all transactions between the parties, which occur while the relation exists.'" In the instant case McGah held money of his client, the defendant, at times

amounting to thousands of dollars, without crediting defendant with any interest, while at the same time charging defendant interest on the client's debt to him. In the accounting approved by the chancellor there was no showing that such handling of the client's funds and such methods of keeping accounts were fair and reasonable.

The chancellor overruled substantially all defendant's exceptions to the master's report. We have already discussed the exceptions relating to rent assignments, the termination of McGah's authority, and the method of applying interest. There remains the question whether the chancellor erred in allowing \$5000.00 as fees for plaintiff's attorney and taxing that amount as costs; whether, indeed, any fees should have been allowed for plaintiff's attorney, since he represented plaintiff, and defendant was obliged to retain its own counsel. The apportionment of costs, including fees, is prescribed in section 25 of the Partition Act (Ill. Rev. Stat. 1959, ch. 106). In the partition suit defendants in their answer "each deny that the property . . . cannot be divided without manifest prejudice or injury to the parties interested therein and deny that any need exists requiring the sale of said property in order to consummate a partition thereof." Three commissioners were named; Ford and Goldfine reported that the premises were not susceptible of division; Brownlee reported that a fair and equitable division could be made. The chancellor sustained defendant's objections and exceptions to the report of Commissioners Ford and Goldfine,

and, since a decree could not be based on the minority report, three new commissioners were appointed. They found that the premises were not susceptible of division, and it was on the basis of this report that the order of sale was entered. McGah represented plaintiff, and although defendant retained its own counsel because it objected to the complaint for partition, the decree for partition was entered by agreement; no appeal was taken. Likewise, although defendants first objected to a sale of the premises, a decree of sale was entered by agreement, and no appeal was taken. In the circumstances, we think that section 25 of the Partition Act was controlling and that it was proper to apportion the attorneys' fee of \$5000.00 in the partition suit among the parties according to their respective interests in the real estate. Plaintiff has a 575/900th interest in the premises and defendant a 325/900th interest; thus, on the basis of the fee allowed, plaintiff will pay \$3194.44 and defendant \$1805.56. Plaintiff claimed that the \$5000.00 allowance was based upon a Chicago Bar Association schedule. Defendants countered by contending in one of their exceptions to the master's report that, based upon the amount involved--\$107,500.00--the fee should not have exceeded \$3580.00; however, the chancellor is vested with discretion in fixing the amount of fees in matters of this kind. He was in a position to know the nature and extent of the services rendered and to fix a fair and reasonable fee. In *Lee v. Lomax*, 219 Ill.

218, it was said (p. 221) that "courts are entirely capable of forming and exercising an independent judgment on the question."

For the reasons indicated, the decree of the Superior Court is reversed and the cause remanded with directions to restate the accounts of the parties in accordance with the views herein expressed.

DECREE REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

BRYANT, P. J., and BURKE, J., CONCUR.

47890



47890

CITY OF CHICAGO,

Plaintiff-Appellee,

v.

JACOB LEVY,

Defendant-Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

261-1-239^{2d}

MR. PRESIDING JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the trial court finding appellant guilty of a violation of section 78-17.2 d-f of the Municipal Code of Chicago and assessing a fine of \$50.00 and \$10.00 court costs. Defendant appeals.

On January 13, 1959, appellee filed its Statement of Claim, charging a violation of an ordinance of the City of Chicago "on or about November 19, 1958." Appellant filed his appearance on February 4, 1959. On July 1, 1959, after a trial, the court entered the judgment from which this appeal is taken. On July 6, 1959, appellant made an oral motion for a new trial supported by six affidavits, the substance of which was that the repairs had been made during the latter part of June, 1959, or about two weeks before the trial.

Appellee has filed in this court a motion supported by affidavits to strike from the record the purported Report of Proceedings incorporated in the record on appeal and to strike so much of the abstract of record which contains the said

purported Report of Proceedings. Appellant filed objections to the motion to strike, supported by affidavits. The motion to strike was taken with the case.

In support of the motion to strike, appellee contends that the Report of Proceedings, as submitted by appellant, is not properly authenticated, is incorrect and inaccurate and that injury will result to appellee's case if the purported Report of Proceedings is included in the record on appeal.

The purported Report of Proceedings filed by appellant contains "his recollection of what he, affiant, and the witnesses testified to." It was signed by the trial judge and appellant contends that at no time did appellee object to the authentication.

Appellee contends that no notice was received of the presentment of the purported Report of Proceedings to the trial judge. The trial judge's affidavit was filed with a stenographic transcript as a Report of Proceedings. The affidavit states that the purported Report of Proceedings filed by appellant is not a true and accurate statement of the evidence or proceedings had in the trial court, and that it has not been properly authenticated. It also states that the Report of Proceedings submitted by appellee is an accurate account of the trial proceedings in the cause. It

is apparent from the affidavits filed in support of the motion that the purported Report of Proceedings, although signed by the trial judge, does not comply with the rules of this court in regard to the record on appeal. It is neither a "complete stenographer's report" nor a "condensed statement" within the contemplation of Rule 1 (1)(b), for there is no assurance that the contents, whether edited or not, are in fact true. They are a product of appellant's "recollection of what he, affiant, and the witnesses testified to." Nor is it an agreed statement of the pertinent facts filed in lieu of a Report of Proceedings, in compliance with Rule 1 (1)(d), for there is nothing to show that appellee agreed to the contents and in fact, appellee has filed affidavits in support of its motion which deny the receipt of notice of presentment for certification. For the above cited reasons, appellee's motion to strike the purported Report of Proceedings filed by appellant is allowed. However, we will continue with the consideration of the case on the subsequent Report of Proceedings containing the stenographic transcript authenticated by the trial judge, which was filed by appellee.

The Building Inspector of the City of Chicago testified that he inspected the building in question on November 14, 1958, and that he found violations of the ordinance in that certain window frames were loose and rotted. Nothing appears in the record to controvert the Building Inspector's testimony

in this regard. The complaint was filed January 13, 1959, charging a violation of the ordinance "on or about November 19, 1958." Appellant's brief and the affidavits filed support of his motion for a new trial, indicate that the windows were repaired during the month of June, 1959, which is long after the alleged violations referred to in the Statement of Claim filed January 13, 1959. Such belated compliance with the ordinance cannot be made the excuse by which responsibility for violations of the City's building codes may be subverted. At best, it may result in a mitigation of the penalty, as was evidently the case here, for the request of the Statement of Claim was for a penalty of \$200.00, whereas the fine imposed by the court was \$50.00. City of Chicago v. Hadesman, 17 Ill. App.2d 150.

Appellant also asserts that appellee has failed to prove that the property at 1420 West Division Street was located in the City of Chicago, and that without such proof, the Municipal Court of Chicago had no jurisdiction. The Building Inspector testified that he was a Building Inspector in the City of Chicago. To assume that a person so employed would be referring to a building located outside the City of Chicago would be highly unrealistic, especially in view of the probable familiarity of the court with such descriptions of property within the City. We find that there was sufficient proof that the property in question is located in the City of

Chicago, and hence, within the jurisdiction of the Municipal Court. People v. Pride, 16 Ill.2d 82. Furthermore, this is a civil case and governed by the rules of civil procedure.

Appellant's contention that the court erred in denying his motion for a new trial is equally devoid of merit. The affidavits in support of the motion only show that the repairs were completed during June, 1959, or just before the trial. This contention has been disposed of above.

For the foregoing reasons, the judgment of the trial court is affirmed.

AFFIRMED.

BURKE and FRIEND, JJ., CONCUR.

SECOND OPINION

ABST.



47639

HELEN M. HOLMES,

Appellee,

v.

BIRTMAN ELECTRIC COMPANY, et al.,

Appellants.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

261A² 39²

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

The previous opinion (22 Ill. App. 2d 72) holding that the bank's delay in transferring the stock to plaintiff individually was reasonable and justified, reversed the judgment and remanded the cause with directions to enter judgment against the plaintiff. The Supreme Court (18 Ill. 2d 554) reversed our judgment upon the issue of defendants' liability, affirmed the judgment of the Circuit Court in that respect and remanded the cause here to consider and pass upon the issue relating to damages raised by both the appeal and the cross-appeal. The facts are stated in the Supreme Court opinion. We note the following excerpts from that opinion:

"When plaintiff made her demand to have the stock transferred to her individually, [September 23, 1955,] the stock was then at an all time high price in the over-the-counter market, and the stock had already depreciated in market value when the Lenox case was disposed of within a relatively short period of time. * * * Plaintiff sustained damage for the reason that she could not sell her stock, defendants' action having rendered her shares unmerchantable. * * * The bank's actions were analogous to those of a volunteer, and the law does not protect volunteers. * * * Since the bank's letter was perfectly clear as to the

fact that it would not reissue the stock to plaintiff in her own name during the pendency of the Lenox case, it would have been an unnecessary and useless act for plaintiff to have made a demand upon the bank for transfer to a third person or to a bona fide purchaser of the stock."

We are of the opinion and find that the court erred in refusing to grant plaintiff's motion for judgment on the pleadings. The defendants' answers to plaintiff's interrogatories admitted the fair market value per share of the stock on September 23, 1955, to be \$24 per share and on February 20, 1956, to be \$16.75 per share. This was a judicial admission binding on the defendants. Plaintiff was ~~and is~~ entitled to a judgment based on these evaluations for \$20,901.75. Since the defendants' refusal to deliver the stock was wrongful, plaintiff is also entitled to interest thereon at 5% per annum from September 23, 1955.

The defendants' position is that plaintiff has not proved that she suffered any damages and that the judgment against them should be for a nominal amount. They say that the loss or damage resulting from the delay, if any, could have been avoided or minimized by the exercise of reasonable care on plaintiff's part. The Supreme Court stated that plaintiff could not sell her stock, the "defendants' action having rendered her shares unmerchantable." The unmerchantability of plaintiff's stock did not permit her to attempt to reduce her loss by selling the stock. Since the plaintiff seeks only the difference in value of

the stock between the date of her demand and the date the stock was actually transferred, she is entitled to all earned or declared dividends thereon.

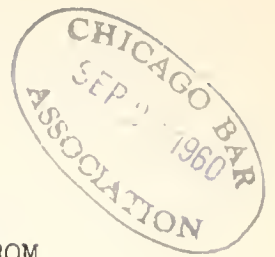
The testimony of the defendants' witnesses Blumenthal and Walsh warrants and requires a finding and judgment for the plaintiff for \$21,576.00 with interest thereon at 5% per annum from September 23, 1955, being the difference in the fair market value of the stock on September 23, 1955 and February 20, 1956.

The judgment of the Circuit Court, affirmed by the Supreme Court upon the issue of defendants' liability, is reversed as to the amount of damages, and the cause is remanded with directions to enter judgment for the plaintiff and against the defendants in the sum of \$21,576.00 plus interest thereon at 5% per annum from September 23, 1955, to the date the judgment is entered.

JUDGMENT REVERSED AS TO AMOUNT
OF DAMAGES AND CAUSE REMANDED
WITH DIRECTIONS.

BRYANT, P. J., and FRIEND, J., CONCUR.

ABST.



47918

SARAH WHITLOCK,

Appellant,

v.

CHICAGO TRANSIT AUTHORITY, a
Municipal Corporation, and
ABRAHAM SCARBOROUGH,

Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

26 I.A. 490^{2d}

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Sarah Whitlock brought suit against the Chicago Transit Authority and its employee Abraham Scarborough to recover damages for the alleged negligence of the defendants in the operation of a bus which collided with an automobile in which plaintiff was a passenger. The jury returned a verdict of not guilty for both defendants, the court entered judgment on the verdict and denied plaintiff's post-trial motions. Plaintiff appeals.

The accident occurred shortly after midnight on September 7, 1956 at the intersection of 63rd Street and Melvina Avenue in Chicago. Plaintiff was employed at Jack's, a tavern located on Archer Road in Argo, Illinois; she worked both as a barmaid and a bartender. On the night in question, Thomas Hardin and Mary Wallen came into Jack's about ten forty-five. Plaintiff had known Mary Wallen for some time--they had previously worked together; Thomas Hardin was a recent acquaintance. While still on duty at the tavern, plaintiff served Mary Wallen a Seven-Up, and

Thomas Hardin a "gin and squirt." The three of them left Jack's together about eleven o'clock and went to a small restaurant, George's Lunch, about half a block from Jack's. After leaving George's Lunch about eleven thirty, Thomas Hardin and the two women started out in his car for Mary Wallen's home at 6217 South Melvina Avenue, Chicago. Plaintiff was sitting in the front seat on the right-hand side. Eugene Sherman, driving east on 63rd Street behind Hardin's car, testified that he noticed the car "weaving" from lane to lane. Within a couple of blocks of Melvina, there were three other cars traveling east. The bus was going west. Scarborough, the bus driver, testified under section 60 of the Civil Practice Act (Ill. Rev. Stat. 1959, ch. 110) and said that the collision occurred about fifteen to twenty feet west of the intersection of Melvina Avenue. As he approached that street there was a flow of traffic going east. When he first saw the Hardin car, he said, "it was about 20 feet away from me coming right at me. It was then completely over the center line of 63rd Street between the two westbound lanes and about 15 to 20 feet west of Melvina. . . . It [the car] was going northeast on an angle." According to Sherman, Hardin began to slow down about a block before Melvina and flashed his left-turn signal. At the intersection of 63rd and Melvina, Hardin's car made a left turn to go north on Melvina in front of the westbound bus, when the bus was one to one-and-a-half car lengths from the intersection. The collision occurred when the left turn was half completed. Hardin's car was spun around and

came to rest at the northwest corner of 63rd and Melvina, facing "mostly west"; the bus came to rest in a ditch about twenty to thirty feet from the northwest corner of 63rd and Melvina. The speed limit on 63rd Street near Melvina was twenty-five miles an hour; there is a conflict in the evidence as to the rate of speed at which the bus was proceeding immediately prior to the accident. Hardin, whom plaintiff charged with wilful and wanton misconduct, was not served with process, and the trial proceeded only as to the Chicago Transit Authority and Scarborough.

As the principal ground for reversal it is urged that the court erred in giving defendants' instruction No. 27, as well as five other peremptory instructions which are said to be overlapping.

Instruction No. 27 reads as follows:

The Court instructs the jury that the plaintiff was not relieved from the exercise of due care and caution merely because she was a guest in the automobile in which she was riding; but she was bound to use and exercise ordinary care and caution for her own safety; and if you believe from the evidence that the plaintiff at and immediately before her injury failed to exercise ordinary care and caution for her own safety which caused or proximately contributed to her injury, or that she failed to use her senses and faculties to warn the driver of the automobile in which she was riding of approaching danger and that her failure to do so under all the circumstances and conditions in evidence was negligence on her part which caused or proximately contributed to her injury, then the plaintiff cannot recover from the defendants, Chicago Transit Authority and Abraham Scarborough, and you should find said defendants not guilty.

It is urged that the vice of this instruction is that the jury were told that plaintiff had the duty as a matter of law "to warn the driver . . . of approaching danger . . ." Defendants' counsel

argue that plaintiff was not excused from exercising due care merely because she was a passenger; that her obligation of due care depended on the circumstances of the case. Counsel say that plaintiff was guilty of contributory negligence by allowing herself to be driven by a man she knew had been drinking, and that in doing so she deliberately exposed herself to danger and therefore cannot recover damages for an injury that could have been avoided by reasonable precaution. However, there is no evidence of drunkenness; no testimony that Hardin had more than the one drink served him at Jack's. Defendants' contention of contributory negligence is predicated on Sherman's testimony that Hardin was "weaving" before he approached Melvina Avenue, and also upon the failure of plaintiff to warn Hardin before he made a sudden and unexpected turn in front of the bus. Presumably Hardin was as aware of the approach of the bus as plaintiff, and therefore a warning would have been of no avail. The weaving of Hardin's car took place several blocks before it reached the intersection; then the car straightened out and slowed down, contemplating a turn.

Under somewhat similar circumstances, the court, in Price v. Chicago Transit Authority, 351 Ill. App. 376, reversed a judgment of not guilty because of an instruction which imposed a duty upon plaintiff greater than the law required, citing various Illinois decisions. The court there observed that as a general rule a passenger in an automobile is under no obligation to warn the driver. This is especially true where the driver has the same opportunity of observing the approaching traffic as the

passenger; in *Smith v. Carter*, 302 Ill. App. 235, the court observed that a passenger in an automobile need not warn the driver of the approach of other cars which the driver sees.

It is also urged that the courts in this State have consistently disapproved the giving of a large number of instructions tendered on behalf of the defendant which contain the language "plaintiff cannot recover" or "you should find defendant not guilty." *Forslund v. Chicago Transit Authority*, 9 Ill. App.2d 290, and cases cited therein. Numerous peremptory instructions of this kind are likely to arouse subconsciously in the minds of the jurors the suggestion that the court believes the defendant to be not guilty. In the case at bar, of defendants' twenty-one given instructions, six were peremptory. In a close case, as is the one before us, excessive repetition of such a peremptory charge constitutes reversible error. *Stone v. Warehouse & Terminal Cartage Co.*, 6 Ill. App.2d 229, and cases there cited.

Since we feel impelled to reverse the judgment for the giving of instruction No. 27 which, we think, was erroneous and prejudicial, as well as for the five other peremptory instructions mentioned, we refrain from discussing in detail the evidence bearing upon the question of negligence and contributory negligence. For the reasons indicated, the judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

JUDGMENT REVERSED, AND CAUSE
REMANDED FOR A NEW TRIAL.

BURKE, P. J., and BRYANT, J., CONCUR.

ACEST.



47867

JACOB SEIDNER and ROSE SEIDNER,)
Appellants,)
v.)
JOSEPH SCARDINA,)
Appellee.)

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO

26 I.A. 2d 431

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiffs, Jacob and Rose Seidner, landlords, brought suit against defendant, Joseph Scardina, under the Forcible Entry and Detainer Act (Ill. Rev. Stat. 1959, ch. 57) for possession of store premises located at 1236 North Clark Street in Chicago. Defendant occupies the premises as a tavern and liquor store under a written lease. The trial judge resolved the issues in favor of defendant and entered the judgment from which plaintiffs appeal.

Defendant had occupied the premises under a five-year lease, with an option to renew, which he exercised for another five years in 1958, at an increased rental of \$225.00 per month. J. M. McCarthy and Company, real estate agents, since December of 1958 managed the property and collected the rents. The lease provided that the monthly installments of rent were payable, each in advance, on the first day of every month, and that the time of all payments was of the essence of the agreement. McCarthy testified that, since he had assumed management of the property, defendant generally paid his rent about the fifteenth of each

month, and sometimes as late as the eighteenth or nineteenth.

On May 27, 1959 Mrs. Seidner, together with her attorney, Emmmanuel Seidner, called on defendant at his store and personally delivered to him a letter written by Seidner, a copy of which was introduced in evidence because defendant failed or refused to produce the original, stating that their attention had been called to the fact that defendant had not been paying his rent on the first day of the month, as required by the lease, and concluding:

You will kindly take notice that you are required to pay rent on the first day of each month and that our client insists that you conform with this requirement.

The notation at the bottom of the letter indicates that it was "Delivered personally."

Paragraph 12 of the written indenture of lease, sometimes known and referred to as a no-waiver provision, reads in part as follows:

The acceptance of rent, whether in a single instance or repeatedly, after it falls due, or after knowledge of any breach hereof by Lessee, or the giving or making of any notice or demand, whether according to any statutory provision or not, or any act or series of acts except an express written waiver, shall not be construed as a waiver of Lessor's right to act without notice or demand or of any other right hereby given Lessor, or as an election not to proceed under the provisions of this lease.

Paragraph 16 of the lease provides in part:

The Lessor may collect and receive any rent due from Lessee, and payment or receipt thereof shall not waive or affect any such notice, demand, suit or judgment, or in any manner whatsoever, waive, affect, change, modify or alter any rights or remedies which Lessor may have by virtue hereof.

It appears that since December 1958 McCarthy's office had sent defendant a monthly rent statement just before or on the first of the month, and that on June 1, 1959 it mailed in Chicago such a statement for the June 1959 rent. Defendant testified that he received this statement on June 4, 1959 and sent a check over on the following day. However, the suit for possession of the store premises had been instituted on June 3, 1959. The envelope, with postage cancellation, containing the rent statement for June, was not produced in court by defendant nor offered in evidence. Defendant testified that he sent his son with a check to McCarthy's office on June fifth, and that the girl in the office refused to accept the check. Mrs. Seidner testified that she had asked the office not to accept the June rent after June first. A day or two after June fifth, defendant sent the check and rent memorandum to his attorney, who testified that he mailed it to McCarthy on June 9, 1959, and that it was returned on June 11, 1959, marked "refused." The letter accompanying the check was not offered nor received in evidence.

Defendant was personally served with summons on June 5, 1959. His rent check is dated on that day. He admitted the service of summons on him but was confused as to the exact date when it was served; he first testified that he was served

with summons on the fifth, then stated that he thought it was the sixth, and, when his attention was called to the fact that the sixth was a Saturday, he thought it might have been the seventh, but could not remember definitely.

The no-waiver provisions of the lease have been held valid in *In re Wil-low Cafeterias, Inc.*, 95 F.2d 306, in *Vintaloro v. Pappas*, 310 Ill. 115, and in *McKinney v. Mulvey Mfg. Co.*, 157 Ill. App. 339. In the *Wil-low Cafeterias* case the court said that waiver of the right to terminate a lease is always a matter of intent, and that although intent to waive may be inferred from acceptance of rent under certain circumstances, such an inference may be rebutted by an express agreement between the parties that rent was accepted and paid without prejudice. The *Vintaloro* and *McKinney* cases are to the same effect. In the *McKinney* case the lease contained a clause requiring prompt payment of rent, a no-waiver provision, and a no-notice provision; not to adhere to these provisions would, the court said (p.343):

be to present to this plaintiff, and every landlord, sufficient inducement at all times and under all circumstances to stand strictly to and enforce promptly the provisions of the lease, for if the landlord, by accommodating delay extends any favor no matter how small or casual to his tenant, he exposes himself to the danger of having the law and courts of law read into his lease terms and provisions which the parties thereto intentionally and specifically eliminated.

There, as here, the lease specifically provided for the right of forfeiture without notice of such intention. The court held



that the lessee, having voluntarily entered into such a covenant, had as full notice and knowledge of its default in the payment of the rent, and of the effect of such default, as if notice of the intention to terminate had been served upon it in advance. Thus, under the authority of the McKinney case, plaintiffs here could have maintained their suit without giving notice to defendant.

In the view we take it will be unnecessary to discuss the contention of plaintiffs that defendant further violated the terms of the lease by failing to take out plate-glass insurance, as provided in the lease.

We are of opinion that plaintiffs are entitled to possession because of defendant's failure to pay rent on June 1, 1959. The no-waiver provisions of the lease are valid and have been recognized under decisions heretofore cited. Under all the authorities that have been called to our attention plaintiffs were entitled to reinstate strict performance as to the subsequent payments, even though they had waived them previously by accepting delayed payments. The judgment of the Municipal Court is reversed, and the cause remanded with directions to enter judgment for possession in favor of plaintiffs and against defendant.

JUDGMENT REVERSED, AND CAUSE
REMANDED WITH DIRECTIONS.

BRYANT, P. J., and BURKE, J., CONCUR.

A circular stamp from the Chicago Bar Association, dated September 1930. The text "CHICAGO BAR ASSOCIATION" is curved along the top and sides, and "SEP 1930" is in the center.

EMIL DRAHEIM.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

26 T.A. 492^{2d}

This is an appeal from a decree granting a divorce to appellee and dismissing appellant's counter complaint for divorce for want of equity. The ground for the decree was desertion.

The parties were married in 1951 in Fond du lac, Wisconsin. At the time of the marriage appellant was 51 and appellee was 61 years of age. No children were born to or adopted by the parties. In March, 1953, the parties came to Chicago, where appellant obtained a position as manager of an apartment building. She was paid \$100.00 per month and was given a rent free apartment at 4827 Lake Park Avenue, where the parties lived until March of 1955, when appellee purchased a rooming house at 6425 Stewart Avenue, Chicago, Illinois. Appellee moved to the newly acquired building as manager. Appellant continued to work and live at the Lake Park address, and two or three times each week went to the Stewart Avenue address to assist in the work there.

On or about January 15, 1956, an altercation occurred between the parties when appellant found a woman and a young boy playing checkers in the kitchen of the apartment at 6425 South Stewart Avenue. Thereupon, appellant took her belongings from that apartment and stated that she was leaving appellee.

Appellant contends that the trial court erred in granting a divorce to appellee because there were no grounds upon which to predicate a finding of desertion by appellant.

The evidence as presented indicates that the arrangement whereby each party maintained his or her own apartment was entirely agreeable to appellee before, at the time of and after his wife's departure from the Stewart Avenue address. The evidence shows that after leaving the Lake Park apartment, which he had shared with his wife, appellee made no arrangements for his wife to live with him permanently at the Stewart Avenue address and that he often visited appellant at the Lake Park address. There is also evidence that appellant offered to resume relations with him after the separation and before the statutory period had run.

The statutory authority for granting a divorce provides that it shall be lawful for the injured party to obtain a divorce and dissolution of the marriage when the other party 'has wilfully deserted or absented himself or herself from the husband or wife, without any reasonable cause, for the space of one year.' (Ill. Rev. Stat. 1959, Chap. 40, sec. 1)

To be made the basis for a divorce action, an absence must clearly be against the will of the plaintiff. Floberg v. Floberg, 358 Ill. 626; Lutticke v. Lutticke, 406 Ill. 181. Neither a husband or wife in this state is entitled to a divorce on the ground of desertion where the alleged desertion took place with the consent of the complainant. Maxwell v. Maxwell, 333 Ill. App. 625. Where one has, either expressly or impliedly, consented to the original separation or its continuance, and has not revoked such consent, he is not entitled to a divorce for desertion. Larimore v. Larimore, 299 Ill. App. 547. The finding of intention must be based upon the facts of each individual case and may be inferred from the conduct of the parties themselves. Lemon v. Lemon, 14 Ill.2d 15.

The trial court was in a position to observe the conduct of the witnesses and their demeanor while testifying, to determine their credibility and to weigh the evidence and determine the preponderance thereof. Under such circumstances the chancellor's findings of fact are entitled to the same weight as the verdict of a jury, and this court is guided by the same principles as would apply had there been a verdict of a jury. Balfour v. Balfour, 20 Ill. App.2d 590. Where the chancellor sees the witnesses and listens to their testimony, his finding of fact will not be disturbed by the court unless they are manifestly against the weight of the evidence. Fox v. Fox, 9 Ill.2d 509, 517.

In this case, when appellant found a woman and a boy playing checkers in appellee's apartment, she left, saying, "I am leaving, you can keep your money and sleep with them; I am leaving for good." This was testified to by appellee, and was corroborated by two other witnesses. However, appellant testified that she subsequently made offers to return to her husband which were refused, and that in fact, an agreement to resume marital relations had been the basis for voluntarily dismissing a separate maintenance suit which she had filed within one year of the separation. This was not specifically denied by him. From the evidence in the record, it is clear that the manifest weight of the evidence does not support the decision of the chancellor in granting the divorce. Mere incompatability of temperament may not be made the basis for divorce. *Garvey v. Garvey*, 282 Ill. App. 485.

Nor can relief be granted on appellant's counter complaint for divorce, since the allegations of cruelty, adultery and desertion therein contained are not supported by the evidence. *Balfour v. Balfour*, *supra*, 596-597.

The decree of the Superior Court dismissing the counter complaint for want of equity is affirmed, and the decree of divorce is reversed and the cause remanded with directions to enter a decree dismissing the complaint.

AFFIRMED IN PART AND REVERSED IN
PART AND REMANDED WITH DIRECTIONS.

BURKE and FRIEND, JJ., CONCUR.

ABST.

47859

GLORIA HARRIS, Administrator of the
Estate of WILLIAM HARDAWAY, Deceased,

Plaintiff-Appellee,

v.

AETNA INSURANCE COMPANY, INC., a
corporation,

Defendant-Appellant.



APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

26 I.A. 2d 2

MR. PRESIDING JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT

This is an action on an insurance policy to recover funeral expenses incurred in connection with the burial of a person killed while operating the automobile covered by the policy. A motion to strike the original statement of claim was sustained, after which an amended statement of claim was filed. Upon plaintiff's motion, and after a consideration of affidavits and briefs filed in connection therewith, the court entered a summary judgment in favor of plaintiff in the amount of \$700.00, which included attorneys' fees and interest. Defendant's motion to vacate the order of summary judgment was denied and defendant here appeals.

The circumstances surrounding the accident are agreed upon. William Hardaway, deceased, was employed in a parking garage from which he was in the process of delivering the insured's car to its owner when the fatal crash occurred.

The question presented for decision is whether certain exclusionary provisions of the policy prevent recovery of funeral expenses on behalf of a person employed by a garage and driving the automobile only for purposes of parking.

The pertinent provisions of the policy are as contained in part II. They provide in part:

"Coverage C - Medical Payments - To pay all reasonable expenses incurred within one year from the date of accident for necessary medical, * * *, and funeral services."

"Exclusions - This policy does not apply under Part II to bodily injury:

- (a). * * * ;
- (b). * * * ;
- (c). * * * ;
- (d). to any person who is employed in the automobile business, if the accident arises out of the operation thereof and if benefits therefor are in whole or in part either payable or required to be provided under any workmen's compensation law;
- (e). * * *."

The rules to be applied in construing insurance policies have often been stated. The instrument should be considered as a whole and if any ambiguous or equivocal expressions are found, the policy is construed most strictly against the insurance company, for the provisions of an insurance policy are usually not the product of negotiations between the parties but are written by the insurance company and out of necessity, perhaps, submitted for acceptance without change. *Fogelmark v. Western Casualty & Surety Co.*, 11 Ill. App.2d 551. However, as was stated in *O'Daniell v. Missouri Ins. Co.*, 24 Ill. App.2d 10, at page 14:

"That principle does not authorize a perversion of language or the exercise of inventive powers for the purpose of creating an ambiguity where none exists. [citing cases]

"In view of the fact that an ambiguity must be resolved in favor of the insured, it seems that the courts should not, as a first step, strain the meaning, or depart from ordinary English usage, for the purpose of creating an ambiguity, so as to bring into play the principle of favoring the insured."

Having applied the above principles to the case at hand, we are unable to say that there is an ambiguity in the pertinent provisions of the policy. Exclusion (d) applied to anyone employed as the decedent was here.

The summary judgment is reversed and the cause is remanded with directions to enter judgment against plaintiff.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

BURKE and FRIEND, JJ., CONCUR.

CHICAGO BAR
ASSOCIATION

[illegible]

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

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Demands for possession in the form of landlord's five day notices were served on the individual defendants on the first day of April, 1959. The notices called for possession

in five days from the date of service unless payment of the rent allegedly due was made first. The notices were served by plaintiff and another stranger to the defendants, who introduced plaintiff as the new landlord and advised the individual defendants that their rent was to be paid to an agent appointed by plaintiff. No forewarning that there had been a change in the ownership of the property was received by defendants, and no evidence was introduced to show that any had been sent. No authority to pay plaintiff the rent was received from the person to whom defendants had been obligated to pay rent. The record shows that plaintiff attempted to establish the relationship of landlord and tenant by introducing deeds, but that these were subsequently withdrawn from evidence. Evidence was introduced that defendant Weston, who is a former owner of the property, borrowed money from plaintiff, which the plaintiff had been unable to collect, and that a quit-claim deed had been given by defendant Weston to plaintiff.

Appellant contends that no right to possession was shown by appellee and that no rent was due to him at the time the notices were served.

Ill. Rev. Stat. 1957, Chap. 80, sec. 8, provides in part as follows:

"That a **landlord** or his agent may, any time after rent is due, demand payment thereof and notify the tenant, in writing, that unless payment is made within a time mentioned in such notice, not less than five days after service thereof, the lease will be terminated. If the tenant shall not within the time mentioned in such notice, pay the rent due, the landlord may consider the lease ended, and sue for the possession under the statute in relation of [to] forcible entry and detainer. . . ."

Ill. Rev. Stat. 1957, Chap. 57, sec. 2, dealing with forcible entry and detainer, provides in part:

"The person entitled to the possession of lands or tenements may be restored thereto in the manner hereafter provided:

First, When a forcible entry is made thereon.

Second, When a peaceable entry is made and the possession unlawfully withheld.

Third, . . ."

This action is under clause two of section two since defendants' entry was peaceable.

The relation of landlord and tenant, or other contractual relationship, need not exist to authorize restoration to possession of the party entitled to it under the second clause. *Thomasson v. Wilson*, 146 Ill. 384, 392. The grantee of the landlord may maintain the action. *Allen v. Webster*, 56 Ill. 393; *Fisher v. Smith*, 48 Ill. 184. It is not necessary for the plaintiff in a forcible detainer action, as contrasted with a forcible entry and detainer action, to have had possession nor for the defendant to have received possession from him. *West Side Trust and Savings Bank v. Lopoten*, 358 Ill. 631, 638. An equitable defense is not available under this action. *St. Louis National Stock Yards v. Wiggins Ferry Company*, 102 Ill. 514.

However, it is necessary for the plaintiff to have a right to possession and the action being purely possessory, the question of title may not be determined. *Saxmann v. Allen*, 410 Ill. 31; *Loekelt v. Stoltz*, 323 Ill. App. 164. Title

documents may be received in evidence to disclose a right to possession in the plaintiff, but where it appears that there is a serious contest with respect to title and the right to possession derived therefrom, the issue cannot be tried in a forcible detainer action. Urbach v. Green, 15 Ill. App.2d 186, 188. Only the right to possession is properly in controversy in such a case. Thomasson v. Wilson, supra. The plaintiff must show a right of possession in himself and cannot rely upon the lack of right in those he seeks to dispossess. Brunton v. Habel, 333 Ill. App. 333.

In the instant case, the appellee has failed to show his right to possession. Appellants had never been informed that there had been a change in landlords and had never paid any rent to appellee or attorned to him before the notices were served. The appellee and the person who introduced him to the tenants were complete strangers to appellants. The documents of title or other evidence of title which might have been submitted to show the appellee's right to possession, (Goldblatt Bros. v. Hofeld, Inc., 284 Ill. App. 31) were withdrawn after being offered in evidence. In the absence of any substantial evidence in the record indicating a right to possession in the appellee, we are unable to say that he was entitled to maintain this forcible detainer action.

In view of the foregoing, it becomes unnecessary for us to consider appellants' other contention that the notices

did not comply with the requirements of the statute because no rent was due to appellee at the time of service.

For the above mentioned reasons, the judgment of the trial court is reversed.

REVERSED.

BURKE and FRIEND, JJ., CONCUR.

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